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**Mr. Mukul Garg**
14/C, Pocket- A,
Sukhdev Vihar, Delhi

# NIOS SENIOR SECONDARY - INTRODUCTION TO LAW (338)

Complete Textbook (31 Lessons)

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Notes

1

# MEANING OF LAW

Have you ever felt the necessity of 'Law' in your day to day life? Have you seen any one being booked by the Traffic Police for Violating traffic rules? Dou you feel the necessity of a birth certificate when a child is born? After death, do you know the importance of a death certificate? In fact, Law affects all aspects of our life. It rules us from cradle to grave. It protects us right from the mother's womb to our education, service, marriage and other important events of life. Law plays an important role in our daily life, right from buying a newspaper or a bottle of milk or any other big or small item necessary for our life. Law is so important for our life that it becomes necessary to understand various aspects of law viz. What are the sources of Law, what are the kinds of Law and finally its application for the best use of our society.

## OBJECTIVES

After studying this lesson, you will be able to:

- understand and define the term 'Law';
- make a broad classification of 'Law';
- identify the various sources of 'Law'; and
- appreciate the role of Indian Legal System, Judiciary, legal professionals and Civil Society in the enforcement of Law and administration of Justice.

## 1.1 MEANING AND DEFINNATION OF LAW

'Law' signifies a rule applied indiscriminately to all actions. It is a notional pattern of conduct to which actions do or ought to conform. 'Law' is a large body of rules and regulations, based mainly on general principles of justice, fair play and convenience and which have been worked out by governmental bodies to regulate human activities. In broader sense, 'Law' denotes the whole process by which organized society, through government bodies and personnel

Notes



(Law-makers, Courts, Tribunals, Law Enforcement Agencies and Executive, Penal and corrective Institutions etc.) attempt to apply rules and regulations to establish and maintain peaceful and orderly relations amongst the people in the society.

The idea of 'Law' as guide to human conduct is as old as the existence of the civilized society. The relevane of law to human behavior has become so intimate today that every person has his or her own conception about its nature which is influenced, of course, by his/her own perspective. Not suprisingly the search for an agreed definition of 'Law' has been an endless journey.

There have been conflicting and divergent views of jurists regarding the nature, concept, basis and functions of Law. 'Law' has been regarded as a divinely ordained rule or a tradition of the old customs or recorded wisdom of the wise men or philosophically discovered system of principles which expresses the nature of things or as a body of ascertainments and declaration of an eternal and immutable moral code, or as a body of agreements of men/women in politically organized society, or as a reflection of divine reason or as a body of commands of the sovereign, or as a body of rules discovered by human experience, or a body of rules developed through juristic writings and judicial decisions or as a body of rules imposed on men/women in society by the dominant class, or as a body of rules in terms of economic and social goals of the individuals.

Therefore, Law can be defined firstly - by its basis in nature, reason, religion or ethics, secondly - by its sources like customs, precedent and legislation, thirdly – by its effect on the life of the society, fourthly – by the method of its formal expression or authoritative application, fifthly – by the ends that it seeks to achieve.

Although, there is no general definition of Law which includes all the aspects of Law yet for a general understanding, some of the important definitions are as follows:

**Aristotle** — It (perfect law) is inherent in the nature of man/woman and can be discovered through reason. It is immutable, universal and capable of growth.

**Austin** — Austin says "Law is the command of Sovereign."
Rules laid down by political superiors to political inferiors. In other words, body of command by a sovereign member or members of an independent society wherein the author of law is supreme.

**Paton** — According to Paton "Law consists of a body of rules which are seen to operate as binding rules in the community by means

of which sufficient compliance with the rules may be secured to enable the set of rules to be seen as binding."

**A.V. Dicey** In the words of A. V. Dicey, "Law is the reflection of Public opinion."

**Ihearing** Ihreaing defines Law as "the form of the gurantee of the conditions of life, of society, assured by State's power of Constraints."

**Salmond** Acording to Salmond, "Law is body of Principles recognised and applied by the State in the Administratiion of Justice" i.e. principles recognized and applied by the State in the administration of justice.

**Kelsen** Norms of human behaviour or pure theory of law which provides that Law is pyramid of norms which has its genesis from on ground norm e.g. Constitution of India.

**Savigny** Law is a matter of unconscious growth within the community and can only be understood in its historical perspective. [Savigny's Volksgiest Theory of Law means will of the people.]

**Roscoe Pound** "Law is a social control through systematic application of force in a politically organised society?" An instrument to satisfy the maximum wants in a society with the minimum of friction and waste.

## INTEXT QUESTIONS 1.1

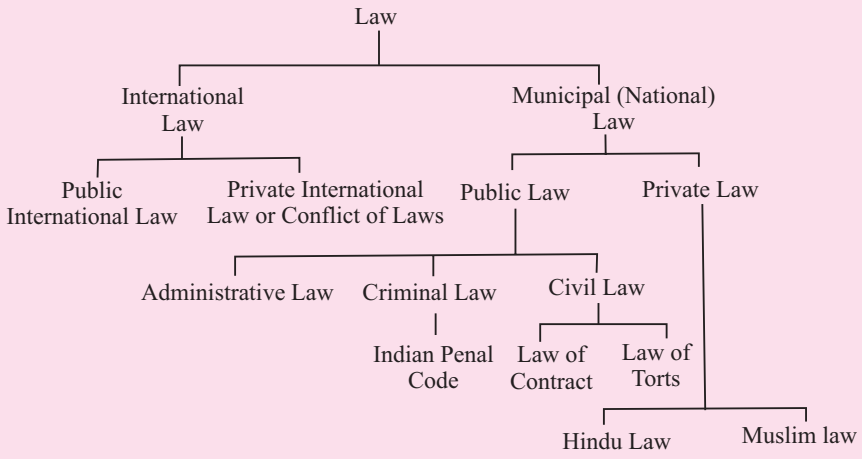
1. Define the term 'Law'?
2. Name the five basis on which Law can be generally described.
3. Pick up and write any of the two definitions of Law given in this lesson which you like most.

## 1.2 CLASSIFICATION OF LAW

For a proper and logical understanding of Law, its classification becomes necessary. It helps in understanding the principles and logical structure of the legal order. It makes clear the inter-relation of rules and their effect on each other and it also helps in arranging the rules in a concise and systematic way.

The broad classification of law may be as follows:

**Broad Classification of Law**




Primarily, 'Law' may broadly be divided into two classes:

## 1. International Law:

International Law is a branch of law which consists of rules which regulate relations between States or Nations *inter se*. In other words International Law is a body of customary and conventional rules which are considered to be legally binding by civilized Nations in their intercourse with each other. International Law is mainly based on Treaties between civilized Nations.

International law may be divided as follows:

### (a) Public International Law

It is that body of rules which governs the conduct and relations of State with other States. For example the extradition treaty between two states to bring back the fugitives.

### (b) Private International Law

It means those rules and principles according to which the cases having foreign elements are decided. For example if a contract is entered into in India between an Indian and a Pakistan citizen, which is to be performed in Ceylon, then the rules and regulations on which the rights and liabilities of the parties would be determined is known as 'Private International Law'

## 2. Municipal Law or National Law:

Muncipal Law is that branch of Law, which is applied within a State. It can be divided into two classes.

### (a) Public Law :

It regulates the organization and functioning of the State and determines the relations of the State with its subjects. It may be divided into three classes:

#### i. Constitutional Law:

Constitutional Law is the basic or fundamental law of the State. It is a law which determines the nature of State and the structure of the Government. It is superior to the ordinary law of the land because ordinary law derives its authority and force from the Constitutional Law.

#### ii. Administrative Law:

This law deals with the structure, powers and functions of the organs of administration; the limits of their power; the methods and procedure followed by them in exercise of their power; the methods by which their powers are controlled, including remedies available to a person against them when his/her rights are infringed by their operation.

#### iii. Criminal Law:

It defines offences and prescribes punishment for them. Its aim is the prevention of and punishment for offences because in civilized societies, 'crime' is considered to be a wrong not against the individual but against the society.

### (b) Private Law:

This branch of law regulates and governs the relations of citizens with each other. It includes Personal Law e.g. Hindu Law and Muslim Law.

Apart from these kinds of law, there are some other varieties of law as follows:

### Natural or Moral Law

Natural Law is based upon the principle of right and wrong. It embodies the principles of Natural Justice.

### Conventional Law

Conventional Law means any rule or system of rules agreed upon by persons for regulation of their conduct towards each other. For example, Indian Contract Act, 1872 deals with the rules on making agreements.

### Customary Law

Any rule of action which is actually observed by men/women when a Custom is firmly established, is enforced by the State as law because of its general approval by the people.

### Civil Law

The Law enforced by the State is called Civil Law. The force of State is the sanction behind this Law. Civil Law is essentially territorial in nature as it applies within the territory of the State concerned.

### Substantive Law

Substantive Law deals with rights and obligations of the individuals against the State and prescribes the offences and punishments for the commission of such offences. For example, India Penal Code, 1860 contains 511 Sections on various offences and corresponding punishments for those offences.

### Procedural Law

It deals with the practice and procedure having its objective to facilitate the administration of justice. It is a process necessary to be undertaken for enforcement of the legal rights and liabilities of the litigating parties by a Court of Law. For example, the Criminal Procedure Code, 1973 enshrines the procedures to be followed to inflict punishment on the wrongdoer.

## INTEXT QUESTIONS 1.2

1. Make out a distinction between Public and Private Law.
2. Distinguish between Substantive and Procedural Law.
3. Describe the main objective of Criminal Law.

## 1.3 SOURCES OF LAW

For a complete understanding of the concept of Law it is necessary to understand the sources of law. Source, literally means a point, from which anything emerges, rises or emanates. The expression 'source of law', therefore, means the source from where rules of human conduct came into existence and derive legal force of binding character. Broadly, sources of law can be divided as follows:

### 1. Custom:

'Custom' is the oldest and most important source of Law. 'Custom' is an embodiment of those principles which have commended themselves to the natural conscience as principles of justice and public utility. 'Customs' originate in frequent repetition of the same act, and therefore, denotes rules of habitual conduct within a community. Uniformity of conduct in like circumstances is, thus, the hallmark of the 'Custom'.

### Essentials of a Custom

To be valid source of Law, a customary practice must fulfil some requirements, of which following are the most important:

a. **Antiquity:** A 'Custom' to be recognized as a law must be proved to be in existence from time immemorial or from long time period.

b. **Continuance:** The second essential of a 'Custom' is that it must have been in practice continuously.

c. **Reasonableness:** A 'Custom' should not be unreasonable, i.e., it must be reasonable in its application to the circumstances of the individual cases. It must not be otherwise imprudent, harsh or inconvenient.

d. **Obligatory Character:** The 'Custom' must have obligatory force. It must have been supported by the general public opinion and enjoyed as a matter of right.

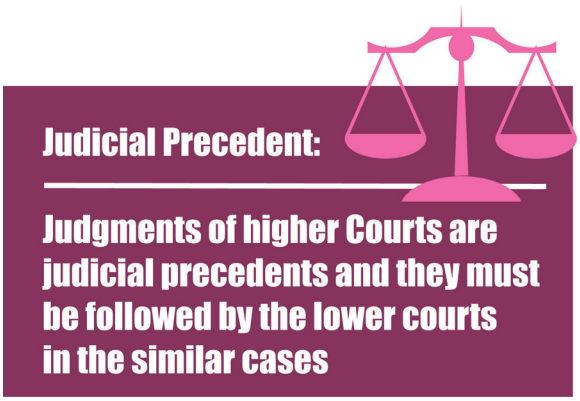
e. **Certainty:** A 'Custom' must be certain. A 'Custom' which is vague or indefinite cannot be recognized.

f. **Consistency:** Customary rules should show a consistency in observance of a practice. If a practice has not been consistently followed it cannot attain the status of a 'Custom'.

g. **Conformity with Statutory Law and Public Policy:** A 'Custom' should be in conformity with a Statute Law and public policy.

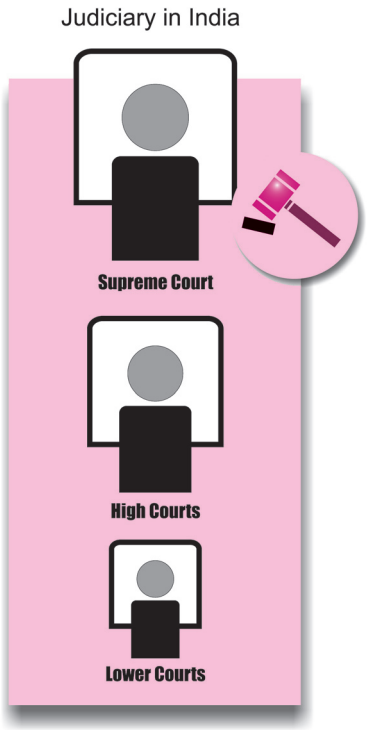
## 2. Judicial Precedent

'Precedent' signifies a set pattern upon which future conduct may be based. It may be an earlier event, decision or action followed in parallel circumstances later. A 'Judicial Precedent' is an independent source of Law. *'Stare Decisis'* is a Latin word which denotes 'to stand by past decision or precedents and not to disturb the settled points'. Precedent or *stare decisis* denote employment of past judicial decisions as a guide for making of future ones for lower courts in heirarchy.


Judicial Precedent:
Judgments of higher Courts are judicial precedents and they must be followed by the lower courts in the similar cases

A 'Judicial Precedent' or *'stare decisis'* has a binding force for the subsequent cases. It is not the whole judgment that is to be binding. In other words every statement made by the judge in an earlier decision is not binding in future case. Only those statements in an earlier decision which may be said to constitute the reason for the decision or '*ratio decidendi*' of that case are binding as matter of general principle, in subsequent cases. '*ratio decidendi*' is the general principle which is deduced in a case. It is the rule of law upon which the decision is founded and it is authoritative in nature.

Apart from '*ratio decidendi*', a judgment may contain observations not precisely relevant to the issue before the Court. These may be the observations upon the broader aspects of law or answer to the hypothetical questions raised by judges or counsels in the course of hearing. Such observations are '*obiter dicta*' and without any binding authority, in so far as these are not essential to the decision reached.



Single unified system of Judiciary in India

### 3. Legislation

'Legislation' is a deliberate process of legal evolution which consists in the formulation of norms of human conduct in a set form through a prescribed procedure by agencies designated by the Constitution. 'Legislation' means to make rules for human conduct.

The term 'Legislation' is derived from the word '*legis*' meaning 'law and *latum*' which means to make or set. Thus, the word 'legislation' means making of law. It is a source of Law which consists in declaration of legal rules by competent authority. 'Legislation' includes every expression of the will of the legislature, whether making law or not.

## INTEXT QUESTIONS 1.3

1. Identify the different sources of 'Law'.
2. Define 'Custom' and also identify the essentials of a valid 'Custom'
3. Define the term 'Legislation'.

## 1.4 ROLE OF LEGAL SYSTEM JUDICIARY, LEGAL PROFESSIONALS AND CIVIL SOCIETY IN THE ENFORCEMENT OF LAW AND THE ADMINSTRATION OF JUSTICE

When society came into existence there was hardly any rule which could regulate the behaviour of the people constituting the society. It was lawlessness,

barbarism and chaos everywhere. In the process of civilization and growth of society, there was the need of a system which could regulate the human behaviour and minimize the friction among them on the basis of set principles of justice and fair play. Many tools were developed for development and betterment of the society. The role of these tools is described as follows:

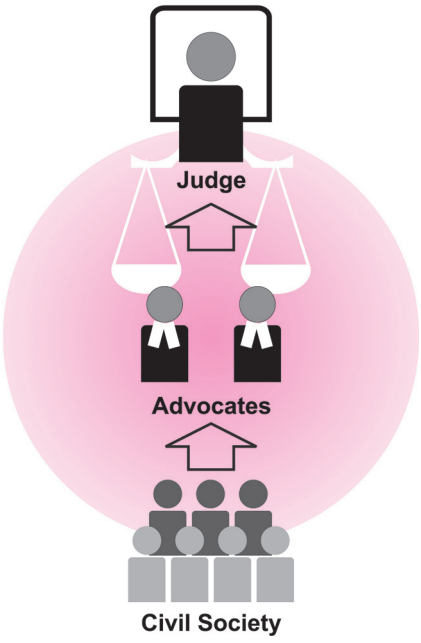
## Role of Legal System:

A Legal System is a set of legal principles and norms to protect and promote a secure living to its people in a society. In this way, it plays an important role by recognizing rights and prescribing duties for the people and also by providing the way to enforce these rights and duties.

To enforce these rights and duties, the Legal System considers the socio-economic and political conditions in the society and makes its own goal and then makes a set of rules or principles and laws which help the society to achieve its identified goals.

## Judges:

The Judges, who are the crusaders of Justice are independent of both Executive and Legislature in a Democratic set up. Therefore, they are the persons who administer justice without fear or favour. They adjudicate the matters before them after proper inquiry in accordance with just, fair and reasonable principles of law to provide justice.




## Advocates:

Advocates are the key functionaries assisting the judges in the administration of justice. They are the officers of the Court and are constituted into an independent profession under the Advocates Act, 1961. Without the expert assistance of the advocates or lawyer on either side of a dispute, judges will find it difficult to find the truth on disputed facts in issue and interpretation of law.

## Civil Society:

In democracy, 'we the people' i.e. citizens and their particular groups play pivotal role in good governance. They create 'Pressure Groups' for seeking attention of the legislature and the government, For example several movements

led by Mahatma Gandhi during the freedom struggle. People's effective participation brings transparency, accountability and responsiveness in the government.

## INTEXT QUESTIONS 1.4

1. What is the importance of Constitution?
2. How does Civil Society helps in bringing good-governance?
3. Analyse the role of Advocates in the administration of Justice.
4. Discuss brifely the role of Judges in the adminstration of Justice.

## WHAT YOU HAVE LEARNT

- 'Law' is a large body of Rules and Regulations based mainly on general principles of justice and fair play to regulate human conduct & behaviour.
- Broadly, 'Law' may be classified into International Law and Municipal (National) Law which can be further divided into Public and Private Law and then Substantive and Procedural law.
- For a complete understanding of 'Law', it is necessary to know the Sources from where it comes. Broadly speaking, Customs, Judicial Precedents and Legislation are the Sources, from where Law emerges.
- With the passage of time, society develops tools to regulate human conduct and behavior which can minimize friction and lawlessness in the society. Legal system, Constitution, Courts, Personnel of Law particularly judges, advocates, Civil Society play a very important role to enforce the rights and duties of the citizens. It also prevents lawlessness, friction and corruption in the society.

## TERMINAL EXERCISES

1. Define the term 'Law'.
2. Identify the various Sources of Law.
3. Identify the different kinds of Law.
4. Describe 'Judicial Precedent',
5. Explain the difference between *'ratio decidendi'* and *'obiter dicta'*.
6. Explain the 'Doctrine of *stare decisis'*.

7. Analyse the role of 'Judges' in the administration of Justice.
8. Explain the role of Advocates in the administration of Justice.
9. Describe the role of Civil Society in good goverance.

**9. Match the Correct option.**

| A | B |
|---|---|
| (a) Fundamental Law of the land | |
| (b) Law deals with offences and punishments | |
| (c) To stand by past decision. | |
| (d) Body of Rules which governs the conduct and relation of state with others | |

**Project**

One day visit a Court of Law which is nearest to your residence and try to understand the components of a Legal System present there.

| Sl.No | Components of Legal System | Observation |
|---|---|---|
| 1. | Role of Constitution | |
| 2. | Role of judges | |
| 3. | Role of Advocates | |

## ANSWER TO INTEXT QUESTIONS

**1.1**

1. 'Law' is a large body of rules, regulations and principles, based mainly on general principles of justice, equity and fair play and convenience which has been worked out by Governmental bodies to regulate human activities.
2. These are the following five bases on which Law can be defined:
   1. It has basis in nature, reason, religion or ethics.
   2. By its sources like Custom, Precedent and Legislation.
   3. By its effect on the life of society.
   4. By the method of its formal expression or authoritative application.
   5. By the ends that it seeks to achieve.
3. Any two definition of Law:-
   (1) Salmond – "Principles recognized and applied by the State in the administration of justice."

(2) Roscoe Pound – "Law is a Social control through systematic application of force in a policically organised Society." An instrument to satisfy the maximum wants in a society with the minimum of friction and waste.

## 1.2

1. **'Public Law'** regulates the organization and functioning of the State and determines the relationship of the State with its subjects whereas Private Law regulates and governs the relationship of citizens with each other.
2. **'Substantive Law'** deals with rights and obligations of the individuals whereas Procedural Law deals with practice and procedure having its objective to facilitate the administration of justice.
3. The main objective of 'Criminal Law' is to prevent crime and to punish the worngdaer.

## 1.3

1. Mainly there are three different Sources of Law.

   1. Customs;

   2. Precedent; and

   3. Legislation.

2. 'Custom' is the oldest and an important source of Law. It is embodiment of those principles which have commended themselves to the natural conscience as principle of natural justice and public utility.

   The essentials of a 'Custom' are :

   (i) Antiquity;

   (ii) Continuity;

   (iii) Reasonableness;

   (iv) Obligatory Character;

   (v) Certainty;

   (vi) Consistency; and

   (vii) Conformity with statutory Law and Public Policy.

3. Legislation means to make law. It includes every expression of the will of the Legislature.

## 1.4

1. 'Constitution' is a fundamental document which covers policy aspiration of people in a given society. It covers rights and duties of the subjects of the

nation on the basis of equality, justice and fairness. It is a document which also provides for powers and responsibilities of the government.

2. The Civil Society members create pressure for seeking attention of legislature and executive branch of the Government. Their participation brings transparency, accountability and responsiveness in the Government and in this way they help in bringing good governance.

3. Advocates are the key functionaries assiting the Judges in the aministration of Justice. They are the officers of the Court and are constituted into an an independent profession under the Advocates Act, 1961. Without the expert assitance of the Advocates on either side of a dispute, Judges will find it difficult to find the truth on disputed facts in issue and interpretation of Law.

4. The Judges, who are the crusaders of Justice, are independent of both Executive and Legislature in a Democratic set up like India. Therefore, they are the persons who administter Justice before them after proper inquiry in accordance with Just, fair and resoanlble pricniples of Law to provide Justice.

Notes

2

# CLASSIFICATION OF LEGAL SYSTEM

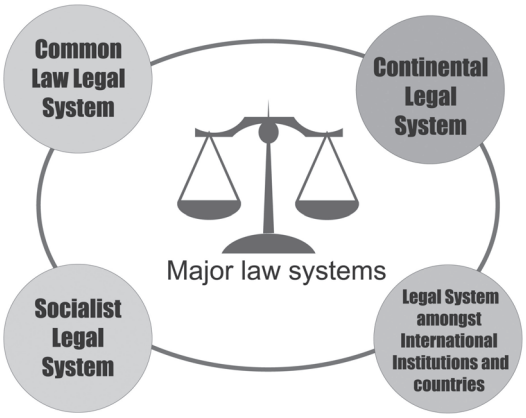
In the prevoius lesson, you must have understood the meaning and concept of law. You are aware of the meaning of law and its different components. Is it interesting? Now you might have started thinking about the Legal Systems all over the world. Initially you might wonder how many Legal Systems might be in the world, but you would be surprised to know that although each country has its own legal system, yet all of them are connected to each other on the basis of common traits and features. These features are common because their sources are very few and can be counted on fingers, and there lies the basis of classification of legal systems. In this lesson, you will understand the different Legal Systems of the world based on broad classifications on the basis of common traits and features. On the basis of such classification, the Legal Systems of the world can be divided into four broad categories: (a) Common Law System, (b) Continental Legal System, (c) Socialist Legal System, and (d) Legal System amongst International Institutions and countries *inter se*. We will discuss these different Legal Systems in this lesson one by one.

## OBJECTIVES

After completing this lesson, you will be able to:

- explain the meaning of 'Common Law System' and its importance;
- understand the importance of 'Continental Legal System' in influencing the development of many other legal systems;
- understand the 'Socialist Legal System' and its impact on the development of other legal systems; and
- know the functioning of International Institutions and the 'Legal System' amongst International Institutions and countries or International Legal System.

## 2.1 COMMON LAW SYSTEM


Common Law Legal System
Continental Legal System
Major law systems
Socialist Legal System
Legal System amongst International Institutions and countries

Do you know the meaning of 'Common Law' ? This question is important. When this question is asked to a lay-man, he/she would say that 'Common Law' means law which is commonly applied. But that is not the meaning of the term 'Common Law'. 'Common Law' is the name of a family of different legal systems of the world which follow common features and traits albeit with small deviations. Those common features which are shared by a member of the family of Common Law are:

(a) authority of the judgments delivered by higher courts and tribunals;

(b) composition of judicial institutions;

(c) adversarial system of court proceedings, and the role of judge, and

(d) the importance of Acts, Statutes, and other legislations passed by competent authorities.

**Common Law System** has influenced the development of many legal systems of the world, such as India, England, U.S.A., Canada, and Australia. Actually, the origin of Common Law is believed to have been in England and so wherever the British Empire spread its sovereignty, the Common Law System was imposed. We will discuss and understand the four common features of this legal system briefly in the following paragraphs.

(a) **Authority of the judgments delivered by Higher Courts and Tribunals:** In 'Common Law System', you would observe that the judgments rendered by the High Courts and Supreme Court (or the Superior Courts) enjoy authority and powerful position. Those judgments have to be obeyed by the lower Courts and Tribunals in a similar case as the decisions of higher courts enjoy authoritative power in law. If the lower courts would not abide by the decisions of the higher courts, the judgments of the lower court can be challenged and it may become a nullity. Do not think that this feature is present in other legal systems. Other legal systems do not place such reliance on the authority of the judgments of the higher Courts. So the judgments of High Courts or Courts of higher/appellate jurisdiction may not be authoritative or binding on lower Courts in a legal system which is not a member of Common Law family. The authority of judgments of the higher Courts is given the technical name '**judicial precedent**'. Thus, we can say that the judgments of higher courts are judicial precedents and they must be followed by the lower Courts in similar cases. For example in India, the

judgments of Bombay High Court are 'judicial precedents' for all the lower Courts coming under the jurisdiction of that High Court and they are bound by it. India is thus a member of Common Law family of legal systems.

(b) **Composition of Judicial Institutions:** Second common feature of the Common Law family is that the judges of the Courts are highly skilled persons who have specially studied the discipline of law and possess practical experience in legal administration either as advocates or judges. A judge, in other words, cannot be a lay person or even a scientist. He must be a person of legal background, either as an advocate or a judge or at least with a degree in law. This feature of Common Law makes the judicial institutions a separate set of professional persons. This might be one of the reasons why the judgments rendered by them are technical and based upon the finer details of the bare provisions of law. This leads to a better quality of judgment due to which these judgments carry authority when they are rendered by experienced judges or advocates. As an example, you can say that in India the judges at the trial Court or District Court are selected on the basis of an entrance examination where the minimum eligibility is a degree in law and the judges of High Courts and Supreme Court are selected from among those with at least 10 years of practice as advocates or judges. Persons outside the legal background cannot become judges of the State or Central government. So, the social background of judges in Common Law system is not diverse, but very limited.

(c) **Adversarial System of Court Proceedings and the role of Judge:** Another feature of Common Law system is that the Court Proceedings are focused on the adversarial nature, where the disputing parties have engaged advocates who act like adversaries in the court of law and each advocate fights tooth and nail against the other in order to win the case. The judge in the court acts like a neutral observer listens patiently to the advocates of each party. You might have seen in the films that the judges say 'Order, order', when there is commotion in the court or the advocates start leveling comments. That is not exactly the power of the judge in the 'Common Law System', but the judge does not play an active role in going beyond the evidence presented by both the adversary advocates. They depend upon the skills of the advocates who present their best possible case before the neutral judge. It does not matter to the judge whether the truth of the matter has been revealed by the advocates in the case or not. He/she has to be satisfied on the evidence presented by the advocates only. He/she does not take any interest in establishing the truth underlying the claims of the disputing parties.

(d) **Acts, Statutes passed by Competent Authorities:** A very important feature of Common Law system is that though the legislations passed by competent authorities such as the Parliament and Legislatures are given an authoritative place which is binding on the judges, whenever the judges find any gaps in the Acts or Statutes passed by the Parliament, they can make suitable

interpretations to fill the gap in these Acts. In other words, the judges and advocates of the Common Law system would think that the Acts are very abstract and the rules contained in those Acts are very general in nature. These general and abstract rules are incapable in themseves to be applied in all facts and circumstances. Facts of every case would be so peculiar that it would be very difficult to apply the general and abstract form of rule which may need suitable additions and interpretations. That addition and interpretation is as important as the bare provision of general and abstract law. For example, the punishment prescribed by the Act passed by Indian Parliament for the commission of murder ranges from life imprisonment to death penalty. However, it has not been prescribed in what situations punishment would be life imprisonment or death. The judges have filled this gap and made their own addition into the law by holding that the 'rarest of rare cases' would be suitable for the death penalty whereas the others would only get life imprisonment.

**Do you know**

The origin of the 'Common Law' is linked to royal power. It was developed as a system in those cases where the peace of the English Kingdom was threatened, or when some other important consideration required, or justified, the intervention of royal power. It seems, essentially, to be a Public Law, for contestations between private individuals did not fall within the purview of the Common Law Courts save to the extent that they involved the interest of the Crown or Kingdom.

## ACTIVITY 2.1

Find out in your local Town the way in which the Courts function and the advocates argue their cases. Observe keenly the behavior of the Judges and their dress. Make a list of the things which you believe, are the characteristic traits of 'Common Law'. Do you think that India follows the Common Law pattern in its Legal System?

## INTEXT QUESTIONS 2.1

1. What do you mean by 'Common Law System'?
2. Mention any three characteristics of 'Common Law System'.

## 2.2 CONTINENTAL LEGAL SYSTEM

The Legal System followed by the countries in the mainland of Western Europe (which is commonly referred to as 'Continent' as distinguished from the island

of England) is referred to as Continental Legal System. The origin of 'Continental Legal System' can be traced to the old age Roman Empire of the 5th century A.D. You might have heard about the Roman Emperor Justinian (A.D.483-565) during whose time many rules and regulations were compiled and were called 'Code'. From that time onwards, this legal system spread all over Europe, including England for some time. In the rest of the world, this legal system was imposed during the era of colonialism during the seventeenth and eighteenth centuries. Now you may find this legal system present in many countries of Southern America and parts of Africa. As you might be aware that in India, even French and Portuguese had come to establish their suzerainty for some time and during that period they had successfully imposed their legal system in those places, such as Pondicherry, Goa, Daman, and Diu.

You may identify the 'Continental Legal System' on the basis of the following salient features:

(a) importance of Acts, Statutes passed by the Parliament or competent authorities;

(b) composition of judiciary;

(c) power of the judges to make law; and

(d) inquisitorial approach of the court proceedings.

We will discuss these features again with respect to 'Common Legal System'.

**Figure 2.1: Court**

(a) **Importance of Acts, Statutes passed by Competent Legislature:** The Acts passed by the Parliament or the competent authorities receive the highest importance in this legal system. Authority of the competent legislature is to assimilate the scattered rules and then draft them according to the modern conditions and get them passed in the Parliament. This is called the process of 'Codification of Rules'. For example, Rules assimilated and framed in the area of crimes are called 'Penal Code'. These rules passed by the Parliament are then applied by the judges in the resolution of disputes. Judges regard the rules framed by the Parliament as supreme and do not try to change it by asserting their own authority as in the Common Law

family. They may give their own interpretations of the vague language used in the Act, but they would say that it would be not binding except upon the parties to the dispute. Interpretations of the rules framed by the Parliament are given not by the judges but by the legal scholars and academicians. The abstract law passed by the Parliament is given high regard even by the judges and advocates.

(b) **Composition of Judiciary:** Judiciary constituted in the Continental Legal System is from diverse fields as a person of any background can be a judge in this legal system. Persons who have specialized knowledge of any particular field may be appointed as judges. Thus, an engineer or a Doctor or a Scientist may become a judge. There is no requirement to study law as a separate discipline for a requisite number of years and practice in the court of law thereafter. So the judges of the higher courts or trial courts are appointed from diverse backgrounds and without the need of a degree in legal education. Legal education is also imparted in the countries which follow 'Continental Legal System', but that is not the only mandatory requirement to become a judge. In India too, you might find that a technical member is sometimes appointed by the court to assist them in arriving at a conclusion in which any technical problem is also involved.

(c) **Power of the judges to make law:** Judges in 'Continental Legal System' do not make laws and their judgements do not carry authority except in the dispute before the court. They apply the laws made by the legislature and cannot make the law themselves. In other words, the judgements rendered by the judges of even the higher courts do not enjoy the status of 'judicial precedents' as in the Common Law System. Their judgements are given respect by the judges in other cases but they are not bound by them. For example, the judgements given by the highest court of appeal in France, namely, 'Court de Cassation' are not binding on all courts of France. However, the judgement of that Court is given high respect in the judicial bodies. The judges of the highest court cannot strike down the law passed by the legislature; they can only apply the law passed by the legislature. One of the advantages of this system is that the voluminous judgments of courts would not have to be read by the lawyers to know the law which is the case in 'Common Law System' and an advocate has not only to know the law passed by the Parliament and legislatures, but also the judgments delivered by the higher judiciary.

(d) **Inquisitorial approach of the court proceedings:** Unlike the passive role of the judges in finding the truth and being dependant on the ability of the advocates to establish the fact of the matter, the judges in the 'Continental Legal System' play active roles in finding the truth. The approach followed in the court proceedings is not adversarial in nature but 'inquisitorial' (the term 'inquisition' means investigative). The judges do not simply act as a referee between the prosecutor and the defense but they actively investigate

the matter themselves with the co-operation of all disputing parties and try to establish the truth by collection of evidence. Collection of evidence is thus not the sole responsibility of the advocates but the judges too. Judges may go to the scene of the crime and collect evidence on their own if they think that the evidence produced by the advocates of the disputing parties leave some doubts as to the establishment of the truth. Judges are not passive observers but active participants in the quest to establish the truth. In India, you may see the application of this approach in the fact finding commissions established by the government. You may have heard of 'Nanavati Commission of Inquiry', established by the Gujarat Government to inquire about the actual facts related to 'Godhra Riots of 2002'.

**Do you know**

'Continental Legal System' originated in Europe and was found by the scholarly efforts of the European Universities (in particular, German) in the twelfth century on the basis of the compilations of the Emperor Justinian of the Roman Empire. Therefore, this legal system is also referred to as "Romano-Germanic Legal System". In this Legal System, law has evolved primarily for historical reasons, as an essentially private law, as a means of regulating the private relationships between individual citizens.

## ACTIVITY 2.2

Inquire from your family members whether they have ever heard of '1984 Sikh Massacre' and the several Commissions of Inquiry constituted by the government to establish the facts. Try to collect as much information as possible on these kinds of Inquiry Commissions.

## INTEXT QUESTIONS 2.2

1. What are the salient features of Common Law System?
2. Discuss the important traits of Continental Legal System.
3. Do you think that India's legal system is a combination of 'Common Law' and 'Continental Legal System' or is it primarily influenced by 'Common Law System' with only a few features of Continental Legal System?
4. The origin of the 'Common Law' is linked to 'Royal Power'.(True/False)
5. In 'Common Law System' the Judgements rendered by High Courts and Supreme Court enjoy authority and powerful position. (True/False)
6. India is a member of Common Law family of Legal Systems. (True/False)

7. The origin of Common Law can be traced to the old age Roman Empire of the 5th century A.D. (True/False)

## 2.3 SOCIALIST LEGAL SYSTEM

An important legal system which has influenced the development of many other legal systems of the world is called 'Socialist Legal System'. This Legal System was adopted by those countries which had started following socialist and Marxist philosophy especially after the First World War of 1914-19. You might be aware that the socialist philosophy was practically adopted by the former U.S.S.R. and China. When the U.S.S.R. disintegrated in the late 1980s, all breakaway countries adopted this Legal System with some modifications, such as Ukraine, Kazakhastan, and Uzbekistan. Apart from China, other countries, such as Mongolia, North Korea and Cuba follow this legal system. You cannot say that this legal system is quite different from Common Law and Continental Legal System. Instead you must know that the 'Socialist Legal System' has been influenced by Continental and Common Law systems. However, there are certain features of this legal system which have distinguished it from other legal systems. Those features are:

(a) legal rules are not considered permanent;

(b) importance of public law;

(c) no judicial review of administration and law passed by the legislature; and

(d) great influence of Continental Legal System.

We will discuss these features one by one in the following paragraphs.

(a) **Legal Rules are not considered permanent:** According to the adherents of this legal system, law is considered to be of temporary character and a time would come when law will not be necessary to govern. The moment every body would become economically equal, there would be no requirement of law. To promote economic equality, courts and law are required. Law, in 'Socialist Legal System', is of revolutionary nature. Unlike Continental Legal System where law is of static character, the 'Socialist Legal System' throws away any law which promotes private property and wealth. For example, when the former U.S.S.R. adopted Socialist Legal System, all the laws promoting private and commercial rights were abolished. Those laws were called 'bourgeoisie law'. Socialist laws are revolutionary in the sense that they do not recognize old laws which sustained capitalism based on private rights and free markets. It aims to overthrow those power relations which build a capitalist system.

(b) **Importance of Public Law:** In 'Socialist Legal System', Private Law has no space and all law has to be in the nature of 'Public Law' which means that all law deals with State matters or public matters, such as Constitutional

Law, Administrative Law, and Criminal Law. By Constitutional Law, we mean that law which determines the nature of the State and the structure of the government. It is above and superior to the ordinary law of the land. Administrative Law deals with the structure, powers and functions of the organs of administration, the limits of their powers etc. Private Law, which regulates and governs the relations of citizens with each other, is either abrogated or is given less importance than the Public Law. Examples of Private Law are the law of torts, contract, property, and intellectual property rights. In 'Socialist Legal Systems', many branches of Private Law have shifted and have become a part of Public Law. Thus, Law of Contract which was considered to be a law regulating the contractual freedom of individuals has also now been substantially controlled and the freedom to contract has been severely restricted in this Legal System.

(c) **No judicial review of administrative action and law passed by the legislature:** Socialist Law theorists traditionally argue that the legislature is conceived to be the supreme expression of the will of the people and beyond the reach of judicial restraint. Legislation, not judicial decisions, is recognized as the sole source of law. They do not believe in the theory of 'separation of powers' according to which the legislature, executive, and the judiciary are independent and separate from each other. Instead, it believes in the unity of all State organs and above all superiority of legislature. It is assumed that the legislative body is responsible for maintaining the constitutionality of State actions and that constitutional review could not be exercised by extra-parliamentary bodies, such as the judiciary. The Constitutions of socialist countries are recognized as the supreme legal force. The judiciary cannot have the power to review the law passed by the legislature and rules framed by the executive under the authority of legislature. The power of 'judicial review' is considered as a tool of the bourgeoisie.

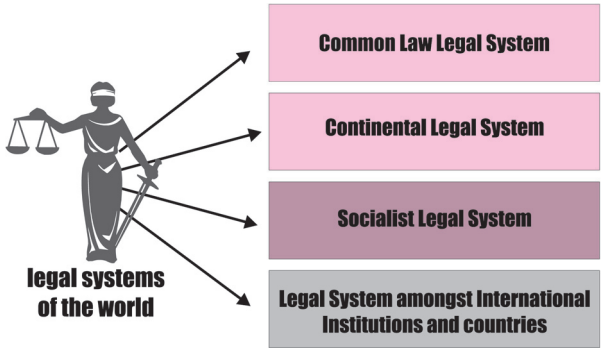
(d) **Influence of Continental Legal System:** The 'Socialist Legal System' is greatly influenced by the 'Continental Legal System'. The members of the socialist family of legal systems are those countries which formerly belonged to the 'Continental Legal System' and the characteristics of that Legal System are still preserved in it except the importance of Private Law. The judges do not enjoy the power to authoritatively interpret the law and to modify it. Judicial precedents cannot be made by the judges who enjoy only the power to apply the given laws and promote social and economic justice thereby. Further, the court proceedings are not adversarial in character but it follows the inquisitorial approach and public prosecution is regarded as provider of justice rather than punishing the offenders. The legal field is also not strictly divided amongst criminal, civil, and intellectual property. This legal system is an integrated one where lawyers may move from one area to another (e.g., from criminal to civil law or from being a defense attorney to a prosecutor) without additional entrance requirements.

## INTEXT QUESTION 2.3

1. What do you understand about 'Socialist Legal System'? Discuss its salient features.
2. Do you think that India should adopt Socialist Legal System? Assess the advantages and disadvantages of this legal system for India.
3. Write five lines each about Public and Private Law.
4. In Socialist Legal System, Private Law has no space and all law has to be in the nature of 'Public Law'. (True/False)
5. In Socialist Legal System, 'Legislation' not 'Judicial decisions', is considered as the sole source of Law. (True/False)
6. The Socialist Legal System is greatly influenced by the Continental System. (True/False)

## 2.4 LEGAL SYSTEM AMONGST INTERNATIONAL INSTITUTIONS AND COUNTRIES *INTER SE* OR INTERNATIONAL LEGAL SYSTEM

Open a newspaper, listen to the radio or watch television or surf the internet, and you will be confronted with events of international nature. Allegations of human rights abuses, killing of civilians during an armed conflict, impact of climate change, and disputes between nations are but a few examples of such events. It is in the context of these events and this interdependence of the countries in the era of globalization that you might think of a different kind of legal system. The legal system which caters to these issues and challenges is known as International Legal System. In this legal system, the legal principles are formulated with a view to promote interactions amongst nations, international institutions and organizations. You can say that without an International Legal System in place, there cannot be a possibility of international peace and security and if international peace and security is not maintained, then there would be no development all over the world. It is for this reason that International Legal System which is a new phenomenon, has taken birth in the twentieth century, especially after the First World War. For the sake of your convenience, this legal system can be understood by four specific examples: (a) Role of Treaties, (b) United Nations, (c) European Union, and (d) SAARC.




(a) **Role of Treaties:** Treaties are a form of agreement between or amongst countries and international organizations which are regulated by International

Law. There are around two hundred countries and several hundreds of international organizations, such as the United Nations, World Trade Organization, World Intellectual Property Organization. You might wonder how these countries and international organizations would interact with each other? Do you not think that mutual agreement is one possible way out to achieve that objective? This kind of agreement is called by various names such as Treaty, Convention, Pact, Covenant, Protocol, Charter, and even simply an Agreement. You might know the names of several such Treaties. The famous examples may be: Versailles Treaty, Kyoto Protocol, Pact of Paris, Charter of the United Nations, and International Covenant on Civil and Political Rights. These Treaties bind the Nations to carry out their responsibilities according to their provisions. If they would not observe those responsibilities, it would amount to breach of a treaty and some kind of compensation would have to be paid by the violating country. There is a fundamental principle in this legal system which says: "Treaties must be observed in good faith". This principle has become a guiding factor in the continued observance of treaties in International Legal System.

(b) **United Nations:** The United Nations is central to the whole international legal system because it has several principal organs, specialized agencies, committees and commissions. It was established in 1945 on the basis of the Charter of the United Nations. You might have known about General Assembly, Security Council, Economic and Social Council, World Health Organization, UN Educational, Scientific, and Cultural Organization. One of the Commissions of the United Nations, International Law Commission (ILC), has been instrumental in drafting many Treaties which are subsequently adopted by the countries and international organizations themselves. Mention must also be made about the role of the Security Council. The Security Council is one of the principal organs of the United Nations and in fact, the most powerful one. It is the executive wing of the United Nations and has been vested with all powers to maintain international peace and security.

Figure 2.2

(c) **European Union (E.U.):** European Union is a remarkable regional International Organization which has economically and politically united the majority of European countries. This regional union was established on the basis of Maastricht Treaty of 1993 and Lisbon Treaty of 2009. The EU has developed a common market for the member countries of EU, which is very significant. They have established an exclusive area called 'Schengen area', in which a passport is not required to enter anywhere in the whole area which includes as many as 22 EU countries and 4 non-EU countries. This Union is also distinguishable from other organizations in the sense that the Lisbon Treaty authorizes the EU to conclude treaties which would enjoy primacy over the national legislations. Key principles of EU law include fundamental rights as guaranteed by the Charter of Fundamental Rights and as resulting from constitutional traditions common to the EU's States. The Treaties are primary legislation of the EU, supported with secondary legislation (regulations, directives, and decisions).

(d) **South Asian Association for Regional Co-operation (SAARC):** South Asian Association for Regional Co-operation was established on 8 December 1985 by the South Asian countries of India, Bangladesh, Bhutan, Pakistan, Nepal, Sri Lanka, and Maldives. Afghanistan also became a member of this organization in 2007. Many Agreements and Conventions have been concluded under the auspices of SAARC, such as Agreement on South Asian Free Trade Area (SAFTA), Agreement on Avoidance of Double Taxation, Convention on Combating and Prevention of Trafficking in Women and Children for Prostitution, Regional Convention on Suppression of Terrorism. It has launched visa exemption scheme also whereby for some defined categories of entitled persons, there would be no requirement of a visa to enter any country of 'SAARC'. These are some of the remarkable achievements of this regional organization which works on the basis of treaties recognized by the International Legal System.

## ACTIVITY 2.4

Find out some of the offices of International Organizations in your city or State capital. List the names of treaties on the basis of which these international organizations work. Collect pictures of those organizations and paste it in your copies and in your diary.

## INTEXT QUESTIONS 2.4

1. Discuss the salient features of International Legal System.
2. What do you mean by 'Treaties'? Do you think that Treaties are an important factor in the development of International Legal System?

3. Compare the structure and working of European Union and South Asian Association for Regional Co-operation (SAARC). Evaluate the merits and demerits of both these Regional Organizations.

4. **Fill in the Blanks**

   (i) The United Nations was established in …….. .(1945, 1948)

   (ii) The South Asian Association for Regional Co-operation (SAARC) was established on …….. .
   (8th December 1985/8th December 1945/8th December 2007)

   (iii) European Union (E.U.) includes ……..European countries.
   (22/26/28)

## WHAT YOU HAVE LEARNT

In the whole world, there are four broad classes of Legal Systems. These are:

(a) Common Law;

(b) Continental Legal System;

(c) Socialist Legal System; and

(d) Legal System amongst International Institutions and Countries 'inter se'.

Common Law countries are those in which four major components are present. These are :

(a) Binding authority of the judgement delivered by higher courts and tribunals;

(b) Composition of judicial institutions from a limited field;

(c) Adversarial system of court proceedings and the role of judge is neutral; and

(d) Importance of Acts, Statutes passed by competent authorities with a condition that whenever the judges find any gaps in the Acts or Statutes, they can make suitable addition and interpretations.

Adherents to Continental Legal System follow four major characteristics :

(a) Binding authority of Acts, statutes passed by competent legislature and judges regard these Acts as supreme and do not try to change them by asserting their own authority;

(b) Composition of judicial institutions from a diverse field;

(c) No binding authority of the judgements delivered even by higher courts & Tribunals; and

(d) Inquisitorial approach of the Court proceedings

Socialist Legal System is that system in which Private Law is given little importance whereas Public Law is regarded as Supreme. Judiciary normally does not review administrative actions and laws passed by the legislature.

## TERMINAL EXERCISES

1. What do you mean by 'Common Law Family of Legal System'? Explain.
2. Describe the main components of 'Continental Legal System'.
3. Can the judiciary review the administrative acts and rules framed by it? Give reasons.
4. What kind of Legal System is present in the United Nations? Discuss briefly.
5. Match the major legal systems in column 'A' with their corresponding application in countries given in column 'B'.

| A | B |
|---|---|
| (a) Socialist Legal System | European Union |
| (b) Common Law Family | Spain |
| (c) Continental Legal System | Pakistan |
| (d) Legal System amongst International Institutions | Russia |

## ANSWER TO INTEXT QUESTIONS

### 2.1

1. 'Common Law' is the name of a family of different Legal Systems of the world which follow common featurs and traits albeit small deviations.
2. The three characterstics of Common Law are :
   (i) authority of the Judgements delivered by higher courts and tribunals;
   (ii) Composition of Judicial Institutions; and
   (iii) Importance of Acts, Statutes and other Legislation passed by competent authorities.

### 2.2

1. The salient features of Common Law System are as follows :
   (a) judgements rendered by the higher courts enjoy binding authority, which is technically known as 'judicial precedent';

(b) judges of the courts are highly skilled persons who have special knowledge of law and are experienced in the administration of justice;

(c) court proceedings are based on the adversarial nature and the judges play a passive role; and

(d) laws passed by the legislature enjoy the same status as 'judicial precedents'.

2. The important traits of Continental Legal System are as follows :

(a) judgements rendered by the higher courts do not enjoy binding authority and are not regarded as 'judicial precedents';

(b) judges of the courts are not essentially from a legal background but from diverse fields, such as arbitration, engineering, medicine, accountancy;

(c) court proceedings are not adversarial in nature, but are called 'inquisitive' and the judges play an active role; and

(d) laws passed by the legislature enjoy the highest authority.

3. I think that India's Legal System is primarily influenced by 'Common Law System' with only a few features of Continental Legal System because of the following factors:

(a) Higher Judiciary enjoys a high status in the whole legal system and its judgments are authoritative;

(b) Court proceedings are adversarial in nature; and

(c) Judges are highly skilled.

However, some of the features of Continental Legal System are also present, such as

(a) presence of tribunals in which judges are appointed from any field, including from the formal judiciary; and

(b) the court proceedings are not adversarial.

4. True

5. True

6. True

7. True

## 2.3

1. 'Socialist Legal System' means a Legal System in which some of the basic features are present, namely (a) law is considered to be of revolutionary character and not static (b) Public law is given more prominence than any other branches of law (c) Acts of administration and the laws passed by the

legislature are normally not reviewed. The examples of such a legal system are : Russia, China, Mongolia, North Korea.

2. I do not think that India should adopt Socialist Legal System because India has been following Common Law System for the last two hundred years and adopting another legal system would be costly and chaotic. There is no need to adopt another system, but instead to reform the existing system. However, the advantages of Socialist Legal System in India would be : (a) judiciary will not waste its time in reviewing the law passed by the Parliament/State Legislatures (b) majority of time consumed by the lower courts in settling private disputes would be saved. The disadvantages of Socialist Legal System would be (a) private property, which is considered a status symbol for every individual, would not be legally protected (b) arbitrary acts of executive would increase.
3. Public Law means that branch of law which deals with state matters or public matters, such as Constitutional Law, Administrative law, and Criminal law. The nature of public law is different from private law. Private law regulates and governs the relations of citizens with each other. Examples of Private Law are : Law of Torts, Contract, Property. Socialist Legal System deals with Public Law and not Private Law.
4. True
5. True
6. True

## 2.4

1. The salient features of International Legal System are :
   (a) In lieu of Acts/Statutes, Treaties play important role. Treaties are binding on a country which becomes a party to it;
   (b) Role of the United Nations to make treaties and enforce the judgments of the International Court of Justice;
   (c) Role of the European Union to make treaties in the European region and enforce the judgments of European Courts of Justice; and
   (d) A mixture of Common Law and Continental Legal System
2. Treaties are "Agreements" between or amongst countries and International Organizations which are regulated by International Law and not the domestic law of the country where the treaty was signed. Yes, I think that Treaties are an important factor in the development of international legal system because they are binding on state parties and the behavior of states may be regulated by them. Examples of Treaties may be : (a) Versailles Treaty (b) Charter of the United Nations, (c) Kyoto Protocol.

3. The structure and working of European Union and South Asian Association for Regional Cooperation are compared as follows:

| EU | SAARC |
|---|---|
| (a) Applicable to western Europe and some parts of Eastern Europe | (a) Applicable to South Asia |
| (b) Acts on the basis of 'Lisbon Treaty' | (b) Acts on the basis of Declaration on Regional Cooperation, 1983 |
| (c) Treaties concluded by EU enjoy primacy over National Law | (c) Treaties concluded by SAARC enjoy primacy over National Law. |
| (d) Primary legislations are called "Treaties" and secondary legislations are called "Regulations", "Directives", and "decisions" | (d) No such classification. |

**Merits of these Regional Organisations**

(a) Broader area of application of the Law

(b) Protects the Region from the influence of other Legal Systems

**Demerits :**

(a) Multiplicity of Regional Organisations

(b) No uniformity in International Legal System

4. (i) 1945

(ii) 8th December, 1985

(iii) 22.

3

# PERSONAL LAW – I: HINDU AND MUSLIM LAW

You might be familiar with the term "personal law" in your day-to-day life, but may not know how to define it. Personal law may be defined as that branch of law which deals with matters pertaining to a person and his or her family. In other words, Personal Law is the law by which an individual is governed in respect of various matters such as, principles relating to marriage, divorce, maintenance, adoption, inheritance, guardianship, succession, etc. All these things are related to validity of a marriage, the effects of marriage on the proprietary and property rights of husband and wife, divorce or nullity of marriage, illegitimacy, legitimation and adoption and testamentary (where a "will" is made) and intestate (where a "will" is not made) and succession to property rights.

India is a country with varied religions, thus the applicability of Personal Law here depends entirely on the basis of separate religious affiliations. Hindus, Muslims, Christians, Parsis, Jews are governed by their own Personal Laws, such as the Hindu law, Muslim Law, Christian Law, Parsi Law, and Jewish Law respectively. From the religion point of view, the Personal Law is defined as "that body of law which apply to a person or to a matter solely on the ground of his/her belonging to or its being associated with a particular religion". In this lesson, you will understand only Hindu and Muslim law and in the next lesson Christian, Parsi and Jewish Law.

## OBJECTIVES

After completing this lesson you will be able to

- understand the meaning of personal law along with the sources of the Hindu and Muslim Laws;
- explain the concepts of marriage and divorce amongst Hindus & Muslims;
- illustrate the rules relating to succession and devolution of property amongst the Hindus; and

- understand the rules relating to inheritance and devolution of property amongst Muslims.

Notes

## 3.1 SOURCES OF THE HINDU AND MUSLIM LAW

### Meaning of the Terms

Before discussing the various aspects of the Hindu and Muslim Law, it is very important to know the meaning of the terms "Hindu" and "Muslim". A Hindu is (a) any person who is a Hindu, Jain, Sikh or Buddhist by religion (in short, they may be called 'Hindus by religion'), (b) any person who is born of Hindu parents, either when both the parents are Hindus or only one of the parents is Hindu (in short, they may be called 'Hindus by birth'), (c) any person who is not a Muslim, Christian, Parsi or Jew and who is not governed by any of the other law,. A Muslim is a person who practices Islam religion. As per judicial opinion, a person may be Muslim either by birth or through conversion. A Muslim is Muslim by birth when both the parents were Muslims at the time of his birth. A Muslim is Muslim by conversion when a person of different religion, on attaining the age of majority and acting with full consciousness, renounces his religion and converts into a Mulim.

With these conceptual clarities, you can understand the different facets of the Hindu and Muslim Law in a better way.

### 3.1.1 Sources of Hindu Law

The study of sources of Hindu Law is the study of various phases of its development which gave it new drives and vigour, that enabled it to conform to the changing needs of the society. Originally, it came to subserve the needs of the pastoral people and now it has come to subserve the needs of modern society. Therefore, it would be convenient to classify the various sources under the following heads:

**1. Ancient Sources:**

Under this head, following four sources are important because Hindu Law is considered to be divine law which are revealed by the God Himself. These revelations are contained in **(1) Vedas or Sruti** and **(2) Smritis**. Vedas are the primary texts of Hindu religion. Smritis provide suplematic exposition of rules contained in the Vedas. Smritis were not always clear and they did not cover all situations. Thus, the need was felt for further analysis, systematization and assimilation of law. This need was satisfied by **(3) Commentaries and Digest.** Finally **(4) Customs** as ancient source of law, cannot be ignored which has been discussed at length in lesson 1 of the Module.

**2. Modern Sources:**

Among the modern sources of Hindu Law are : **(1) Equity, Justice and Good Conscience** – It owes its origin to the beginning of British

administration. In the absence of any specific law or in the event of conflict, the principle of equity, justice and good conscience would be applied. In other words, what would be most fair and equitable in the opinion of judges would be done in a particular case. Thus, a rule of English law founded on public policy that a murderer is to be disqualified from succeeding to the property of the victim found expression in the Hindu Succession Act, 1956.

**(2) Judicial Decisions** – These are considered to be the most fertile and practical source of Hindu law. However, in application judges should introduce those laws derived from recognized and authoritative source i.e. Smritis and Commentaries as interpreted in the judgements of the courts.

**(3) Legislation** – There are four major enactments on Hindu Law viz. The Hindu Marriage Act, 1955, The Hindu Succession Act, 1956, The Hindu Minority and Guardianship Act, 1956, The Hindu Adoption and Maintenance Act, 1956. These legislative enactments which declare, abrogate or modify the ancient rules of Hindu law, form an additional source of Hindu law.

### 3.1.2 Sources of Muslim Law

The following are the important sources of Muslim Law:

1. **The Quran** – Muslims consider the 'Quran' as the basis of their law. They believe that the 'Quran' is the one, that shows the truth as distinguished from falsehood, and the right from the wrong. It is the most fundamental and sacrosanct source of muslim law. It is the Holy book for the Muslims. It conatins express revelations of the Prophet which came to him through angel Gabriel.
2. **Sunna or Hadis** – Prophet made some implied revelations, which contained some holy and pious ideas. Such implied or internal revelations are believed to be made on the inspiration of God. These revelations formed part of the Sunna. In other words, Sunna means traditions of the Prophet, whatever Prophet said or did, are treated as his traditions. These traditions are the second source of Muslim Law.

Sunna is the precept of the Prophet i.e rule of law while Hadis (Hadith) is tradition of Prophet i.e. saying or occurrences.

3. **Ijmaa** - When 'Quran' and 'Sunna' could not supply any rule of law for a new problem then the persons having knowledge of Muslim Law used to agree unanimously and gave their common opinion over that point. Therefore consensus of the founders of law or of the community as expressed by the most learned members is another important source of Islamic law.
4. **Qiyas** – It is collection of rules or principles deducible by the methods of analogy and interpretation from the first three sources.

5. **Custom** – In the absence of a rule of law the text of any of the four sources mentioned above the customary practices has been regarded as law. Custom is not an independent source of Muslim Law. However a customary law exists in Islam either because it has got the approval of the Prophet or, has been incorporated in Ijma.
6. **Legislation** – Although Muslim law in India is not codified, yet some aspects of it have been regulated by the legislations like the Shariat Act, 1937, the Dissolution of Muslim Marriage Act, 1939 and Muslim Women (Protection of Rights on Divorce) Act, 1986 etc.
7. **Judicial Decisions** – There is not much scope for the judicial decisions as source of Muslim Law but in absence of any clear text of Muslim Law, the court may interpret rule of law according to their own concept of justice. However, judicial decision played an important role in laying down Muslim law in accordance with the socio-economic condition of the Indian Muslims. The courts has given some important verdicts in this regard.
8. **Justice, Equity and good conscience** – Like in Hindu law, here also in the absence of any specific law or in the event of conflict, the principle of equity, justice and good conscience would be applied.

## INTEXT QUESTIONS 3.1

1. What do you understand by the term 'Hindu'?
2. What do you mean by the term 'Muslim'?
3. Write down the names of sources of Muslim law.

## 3.2 LAWS RELATING TO MARRIAGE AND DIVORCE

It is said that marriages are made in heaven but the rules of marriage and divorce have been set by the society primarily and later in the course of time codified by the legislature. The codification of rules on marriage and divorce are nothing but cementation of basic customs and customary laws with the mixture of justice, equity and good conscience. Being two different sects of religion, naturally there is difference between customary and legislative procedures of marriage and divorce amongst the Hindu and Muslim.

### 3.2.1 Marriage and Divorce Under Hindu Law

#### Marriage

Hindus have always considered their marriage to be a sacrament, which has implication that it is permanent, indissoluble, eternal not only for this life but for lives to come and is also regarded as a holy union. The purpose of Hindu

marriage is not to beget children and get them legitimated but also to perform religious rituals. The essentials for valid Hindu marriage are as follows:

1. Neither party has a spouse living at the time of marriage;
2. At the time of marriage neither party- (a) is incapable of giving a valid consent due to unsoundness of mind, or (b) though capable of giving a valid consent has been suffering from mental disorder of such a kind as to be unfit for marriage and procreation of children, or (c) has been subjected to recurrent attacks of insanity or epilepsy;
3. So far as the age of marriage is concered the bridegroom must have completed the age of twenty one years and the bride eighteen years; in other word neither of the party should be below the mariagable are, otherwise the marriage will be considered as 'child marriage', and thus being void.

**Child Marriage:** It is a form of marriage where bride and bridegroom has not attained the age of 18 years and 21 years respectively.

4. The parties are not within the degrees of prohibited relationships, unless the custom and/or usage permits such marriage;
5. The parties are not "Sapindas" of each others, unless the custom and /or usage permit such marriage.

**Sapinda** (Particle of same body): Two persons are said to be Sapindas of each other if one is a lineal ascendant of the other within the limits of Sapinda relationship or if both are Sapindas to the common ancestor. The Hindu Marriage Act, 1955 provides the extent of Sapinda relationship to five degrees in line of ascent through the father and three degrees in the line of ascent through the mother.

**Prohibited Degree of Relationship:** A person may be called in the degree of prohibited relationship –

1. If one is a lineal ascendant of the other; or
2. If one was the wife or husband of the lineal ascendant or descendant of the other; or
3. If one was the wife of the brother or the father's brother's wife, or
4. If the two are brother and sister, uncle and niece, aunt and nephew or children of a brother and sister or of two brothers or two sisters.

## Divorce

With the advancement and progress in society it was discovered that if it is not possible to live together as husband and wife, then divorce may be an option for peaceful life amongst the Hindus also. Under the old Hindu law divorce was not recognized except as per the customs. Under the Hindu Marriage Act

divorce is neither encouraged nor favored, it is permitted only on certain specific grounds which are as follows:

1. **Adultery** – Sexual intercourse between a married person and someone other than his spouse after solemnization of marriage.
2. **Cruelty** – Conduct of such a character as to have caused danger to life, limb or health, bodily or mental pain as to give rise to a reasonable apprehension of such danger.
3. **Desertion** – Permanent abandonment of one spouse by the other without any reasonable cause and without the consent of the other or against the wish of such party. Desertion is a total repudiation of all obligations of marriage.
4. **Conversion** – if one of the spouses seizes to be Hindu by conversion to another religion, divorce may be obtained.
5. **Insanity** – Where one of the spouses has been suffering from incurable unsoundness of mind or suffering from mental disorder of such a kind and to such an extent that the other spouse cannot reasonably be expected to live, divorce may be obtained.
6. **Leprosy** – Where one of the spouses has been suffering from virulent and incurable form of leprosy, divorce may be obtained.
7. **Venereal Disease** – where one of the spouses has been suffering from venereal disease in a communicable form divorce may be obtained.
8. **Renunciation** – where one of the spouses has renounced the world by entering into any religious order, divorce may be obtained.
9. **Presumption of Death** – Where a person who is not heard alive by his relations and near ones for a period of seven years or more is deemed to be legally dead. In such a case the other spouse can obtain a decree for dissolution of marriage.
10. **Divorce by mutual consent** – The Hindu Marriage Act provides for divorce by mutual consent. It has following essentials: (a) a joint petition for divorce by both the spouses is presented to the court, (b) the petition should state that they have been living separately for a period of one year and have not been able to live together, and that they have mutually agreed to live separately.
11. **Irretrievable Breakdown of Marriage** – When either party to a marriage presents a petition for divorce on following grounds: (a) there has been no resumption of co-habitation for a period of one year or more after passing of a decree for judicial separation, (b) that there has been no restitution of conjugal rights for a period of one year or more after the passing of a decree of restitution.

### 3.2.2 Marriage and Divorce under the Muslim Law

#### Marriage

In Muslim Law marriage is defined to be a civil contract unlike Hindu Marriage where it is regarded as sacrosanct. The object of Muslim marriage is procreation and legitimization of children. Following are the essentials of a valid marriage:

1. Every Muslim of a sound mind, who has attained the age of puberty i.e. age of 15 years, may enter into a contract of marriage.
2. There should be a proposal made by or on behalf of one of the parties and acceptance of that proposal by or on behalf of the other party.
3. Proposal and acceptance of marriage must be in presence and hearing of two male witnesses who must be Muslims and are of sound mind and major. In Shia law witnesses are not required.
4. The words used in proposal and acceptance must be clear and unequivocal which can convey the intention of marriage.
5. Neither writing nor any religious ceremony is required.
6. Proposal and acceptance must be reciprocal to each other i.e. to say, the acceptance must be exactly for the proposal and nothing else.
7. There must be consideration in terms of dower.

#### Divorce

Firm union of husband and wife is a necessary condition for a happy family life**.** Islam therefore, insists on subsistence of marriage. But under unfortunate circumstances the dissolution of marriage takes place and matrimonial contract is broken. Divorce may be given either by the act of husband or wife. A husband may divorce his wife by repudiating the marriage without giving any reason. Pronouncement of such words which signify the intention to divorce his wife is sufficient. Initially a wife could not divorce her husband of her own accord. She can divorce her husband only where husband has delegated such rights to her or under an agreement. But after enactment of the Dissolution of Muslim Marriage Act, 1939, Muslim wives also got right to dissolve their marriage by an order of the court

## INTEXT QUESTIONS 3.2

1. What are the essentials of a valid Hindu Marriage?
2. Whether a Muslim woman has right to divorce her husband?
3. What do you understand by Child marriage?

Notes

## 3.3 HINDU AND MUSLIM LAW ON SUCCESSION

### 3.3.1 Hindu Law of Succession

Succession is a method of the transfer of property from one person to other after the death of the former. After independence we have uniform secular laws of succession for all Hindus. The old Hindu Law and customary law of succession stand abrogated. The preferential treatment of male over females has been considerably removed with the codification of the Hindu Succession Act, 1956. The law of succession can be classified under two heads:

1. **Testamentary Succession** – The property (separate, divided, undivided) devolves according to the "will" of a person who has the ownership over the property or interest in the same. It deals with the rules relating to the devolution of the property on relations as well as others.
2. **Intestate Succession** – it is based on the rules which determine the mode of devolution of the property of the deceased on heirs solely on the basis of their relationship with the deceased, when the person dies without making his will or testament.

### 3.3.2 Muslim Law of Succession

The property of a deceased person may devolve either by testamentary or intestate succession. Testamentary succession takes place according to the will and testament of the deceased.

Intestate succession is called inheritance under which the legal heirs of the deceased succeed to his property. The Islamic law of inheritance (non-testamentary succession), like the rest of the Islamic Personal law is a combination of the pre-Islamic customs and the rules introduced by the Prophet. The greater part of the Islamic law of the inheritance is founded upon the Quran. After deduction of funeral expenses, expenses of obtaining Probate/Letters of Administration from the court, wages for personal service to the deceased within three months of his death, debts, and legacies, the remaining property (both movable and immovable) becomes worthy to be inherited.

### 3.3.3 Comparative Analysis of Muslim and Hindu Law of Inheritance

1. In Muslim Law, all property is one and there is no distinction between ancestral or self acquired or separate property, whereas in Hindu law there is separate and self acquired property.
2. There are no such things as joint family property in a Muslim family whereas, amongst Hindus the concept of joint family property is prevalent.

3. The right of an heir, for the first time, comes into existence on the death of the ancestor. Right by birth is unknown in Muslim law but in Hindu law right in property is vested by birth.
4. Muslim law does not recognize the doctrine of representation. The estate of the deceased person devolves upon his heirs at the moment of his death. The estate vests immediately in each heir in proportion to the share provided by the Muslim law. As the interest of each heir is separate and distinct, one of a number of heirs cannot be treated as representing the others. Thus, if P's son R dies in the lifetime of P the son of R i.e. grandson of P cannot claim his father's share as representing him but in Hindu law the doctrine of representation is recognized.
5. Muslim law does not recognize any interest expectant on the death of another i.e. *spes successionis* (mere chance of succession) while in Hindu law the doctrine of *spes successionis* is well recognized.

## INTEXT QUESTIONS 3.3

1. What are the kinds of succession in Hindu law?
2. What is the difference between succession and inheritance?
3. What do you mean by doctrine of representation? Whether it is applicable in Muslim law?

## WHAT YOU HAVE LEARNT

- After the completion of the lesson you may have learnt the basics about the Personal Law of the Hindus & Muslims and their meanings.
- The present lesson also deals with various sources of the Hindu and Muslim law and its development up to modern times. It also makes one understand about the importance of personal laws in day to day affairs of life.
- Marriage and divorce are two important issues in the life of almost every person having faith in different religions. The importance of marriage is obvious as it validates the procreation of children and their legitimization. Whereas divorce talks about the mechanism regarding the repudiation of marriage and conjugal rights, when matrimonial life is not smooth. By this lesson you may develop these concepts in Hindu and Muslim law respectively.
- Succession is a set of principles by which property devolves according to the will and testament of the deceased or as per the rules of the personal laws by which he is governed at the time of death as intestate i.e. without making will or testament.

## TERMINAL QUESTIONS

1. Explain the significance of Personal Laws in our day to day life.
2. Write a comprehensive note on the various sources of Hindu Law.
3. What are the important sources of Muslim Law?
4. What do you mean by Sapinda relationship? Also explain the prohibited degrees of relationship.
5. Discuss the essentials of a valid marriage under Muslim Law.
6. What are the grounds for divorce under the Hindu law?
7. Write a short note on the Hindu Law of Succession.
8. Explain the distinction between the principles of inheritance under Hindu and Muslim law.
9. What are the differences on rules of inheritance between the Hindu & Muslim Law?
10. Match the following according to their correct option:

| A | B |
|---|---|
| (a) Sapinda | (i) Hindu Law |
| (b) Doctrine of representation | (ii) consensus of the founders of law |
| (c) Testamentay Succession | (iii) ground of divorce |
| (d) Desertion | (iv) devolution of property by will |
| (e) Ijmaa | (v) Particle of same body |

### Project

Survey your ten neighborhood families and try to gather the information about the applicability of the personal law in their daily life.

| Serial No. | Various aspects of personal law | Remarks |
|---|---|---|
| 1. | Marriage | |
| 2. | Divorce | |
| 3. | Succession | |
| 4. | Inheritance | |
| 5. | Customs | |

## ANSWER TO INTEXT QUESTIONS

### 3.1

1. According to Hindu Law, the definition of a 'Hindu' is as under:
   a. Any person who is Hindu, Jain, Sikh or Buddhist by religion, i.e. Hindu by Religion
   b. Any person who is born of Hindu Parents (viz. when both the parents or one of the parents is Hindu, Jain, Sikh or Buddhist by religion) i.e. Hindus by birth, and
   c. Any person who is not a Muslim, Christian, Parsi or Jew and who is not governed by any of other law.
2. A Muslim is person whose religion is Islam. As per judicial opinion, a person may be Muslim either by birth or through conversion.
   a. Muslim by birth- a person whose both the parents were Muslim at the time of his birth is regarded as Muslim by birth.
   b. Muslim through conversion- any person of any religion, who is of sound mind and has attained the age of majority, can become follower of Islam after renouncing his original religion.
3. Following are the sources of Muslim law, namely – Quran, Sunna, Ijmaa, Qiyas, Custom, Legislation, Judicial decision and Justice, Equity and good conscience.

### 3.2

1. The essentials for valid Hindu marriage are as follows:
   1. Neither party has a spouse living at the time of marriage;
   2. At the time of marriage neither party- (a) is incapable of giving a valid consent due to unsoundness of mind, or (b) though capable of giving a valid consent has been suffering from mental disorder of such a kind as to be unfit for marriage and procreation of children, or (c) has been subjected to recurrent attacks of insanity or epilepsy;
   3. The bridegroom has completed the age of twenty one years and bride is aged eighteen years;
   4. The parties are not within the degrees of prohibited relationships, unless the custom and/or usage permits such marriage;
   5. The parties are not Sapindas of each others, unless the custom and / or usage permit such marriage.

2. Initially Muslim wife cannot divorce her husband of her own accord. She can divorce her husband only where husband has delegated such rights to her or under an agreement. But after enactment of the Dissolution of Muslim Marriage Act, 1939 Muslim wives also got right to dissolve their marriage by an order of the court.
3. Child Marriage is a form of marriage where bride and bridegroom has not attained the age of 18 years and 21 years respectively.

### 3.3

1. The Hindu Law of succession can be classified under two heads:
   a. Testamentary Succession – The property (separate, divided, undivided) devolves according to the will of a person who has the ownership over the property or interest in the same. It deals with the rules related to the devolution of the property on relations as well as others.
   b. Intestate Succession – it is based on the rules which determine the mode of devolution of the property of the deceased on heirs solely on the basis of their relationship with the deceased, when the person dies without making his will or testament.
2. Testamentary Succession takes place according to the will and testament of the deceased whereas intestate succession is called inheritance under which the legal heirs of the deceased succeed to his property.
3. Muslim Law does not recognize the doctrine of representation. The estate of the deceased person devolves upon his heirs at the moment of his death. The estate vests immediately in each heir in proportion to the share provided by the Muslim Law. As the interest of each heir is separate and distinct, one of a number of heirs cannot be treated as representing the others. Thus, if P's son R dies in the lifetime of P, the son of R i.e. grandson of P cannot claim his father's share as representing him but in Hindu law the doctrine of representation is recognized.

Notes

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# PERSONAL LAW II: CHRISTIAN, PARSI AND JEWISH LAW

You have studied in the last lesson that the personal law of Hindus and Muslims play an important role in our legal system. In this lesson, we will examine the personal law of Christians, Parsis, and Jews as incorporated in our legal system. As you might know, Christians are spread all over India and they are, in fact, the third largest religious community in India after Hindus and Muslims. If you go to Goa, Kerala, Tamil Nadu, Manipur, Megahalaya, Mizoram, and Nagaland, you would have the opportunity to interact with them without any difficulty as they are settled in these States in large numbers. Parsis are another religious community who mainly reside in Mumbai and nearby areas of Maharashtra. Their number is too small as their population is estimated at 70,000 only, all over India. Feroz Gandhi, the husband of late Prime Minister Indira Gandhi, Ratan Tata (the famous industrialist), and Sam Maneckshaw (the famous officer of Armed Forces) are some of the well known names in the Parsi community. Jews are another religious group in India who follow their culture and traditions. They are mainly settled in Mumbai and nearby areas in Maharashtra and Gujarat. Prominent Jews in India have been David Sasson (there is Sassoon Library near Church Gate in Mumbai), and Ruth Prawer Jhabwala (famous writer).

## OBJECTIVES

After studying this lesson, you will be able to:

- explain the personal law of Christians, Parsis and Jews and its incorporation in our legal system;
- understand the importance of 'Customary Law' of Christians, Parsis, and Jews and how they have been accepted by our legal system;
- assess the salient features of legislations enacted for the Christians, Parsis, and Jews;
- appreciate the role of 'judicial precedents' in the making of Personal Law of Christians, Parsis, and Jews; and
- identify the Hybrid Legal System and its importance.

Notes

## 4.1 ROLE OF CUSTOM IN CHRISTIAN, PARSI, AND JEWISH LAW

In this part of the lesson, we will try to understand the importance of Customary Rules in the lives and Legal System of these religious groups.

### 4.1.1. Role of Custom in Christian Law

'Custom' plays an important role in the lives and legal system of the Christians in India. In Malabar there is a Christian community commonly known as Malankara Jacobite Syrian Christians. That community traces its origins to 52 A.D. when St. Thomas, one of the disciples of Jesus Christ came to Malabar and established the church there. They are governed by the Hudaya canon and all their customary practices are codified in it. There are other varieties of Syrian Christians in Kerala and elsewhere in India. When the Portuguese established their rule in western parts of India (Goa, Daman, Diu) in the 16$^{th}$ century, they had been successful in establishing Roman Catholic Churches. They found that the Church Order and Customs of the Syrian Christians were not in tune with the Roman Catholic Church and so the customary practices on marriage and divorce, succession and inheritance followed by their churches were codified (The Code of Canon Law) and implemented. However, the Syrian Christians did not altogether stop practicing their own religious Customs and their Customs have been regulated by the Code of Canons of the Eastern (Oriental) Churches. During British rule, these canonic customary laws were practiced by the Christians all over the Churches in India and were modernized by the passing of two specific legislations, namely Indian Divorce Act of 1869 and Indian Christian Marriage Act of 1872. Christians did not recognize divorce in their customary practices and their marriages are regarded as sacramental. The Law of Christian divorce is codified by the name of 'The Divorce Act, 1869. This Act has been amended in 2001 whereby divorce by internal consent is allowed.

These canonic laws and practices were also applied by the Courts in India. Christians are bound to observe the form of marriage prescribed by the canon law in India. Only a person who has received Episcopal ordination can perform the marriage ceremony of Christians according to the customary practices in India. Under Canon 88 of the Roman Catholic Church, a person who has completed 21$^{st}$ years of age is a major. Canon 1607 provides that a man before completing his 16$^{th}$ year and a girl before completing her 14$^{th}$ year cannot contract a valid marriage. Canon 1934 enjoins that a pastor must seriously dissuade minor sons and daughters from contracting marriage without the knowledge of or against the reasonable wishes of their parents. The Courts in India have recognized these canonic practices. Furthermore, the courts have held that the prohibited degrees for the purpose of marriage were those which were

prohibited by a customary law of the Church to which the parties belonged. Hence, if a marriage between a man and his cousin (maternal aunt's daughter) takes place, although it is prohibited, the Church can remove this impediment (Canon 1052). In *Lakshmi Sanyal* v. *Sachit kumar Dhar* (1972), the Supreme Court of India has accepted this position of Canonic Law.

In the matters of succession and inheritance also, the Christians have followed their local customary practices for a long time. The rule of lineal primogeniture by which the eldest son of the deceased would succeed to his property is generally applicable. Wives of Christians were not given any share in the property of the deceased husband. On adoption, Christians of Punjab have been practicing adoption of children for a long time. There is also a Custom of Syrian Christians of Kerala for adoption of a son-in-law. Where there are no sons, the husband of the youngest daughter is taken in adoption.

Many Christians in India, however, adopt Hindu Customs and practices. For example, the Christians of Coorg and Pondicherry have been practicing Hindu customs. Many convertees also in Jharkhand, Orissa, and in the North East practice Hindu customary rules.

## ACTIVITY 4.1.1

Christians reside in every part of India. In the area where you reside, you might have noticed some Churches, missionary schools. Go to some of these places and meet people professing Christianity and ask them about their customary practices. Make a list of their religious, social, and cultural customs and think how they have been preserving those customs and why has the society accepted it.

### 4.1.2. Role of Custom in Parsi Law

#### Custom Relating to Marriage–

Parsi immigrants came to India to escape religious persecution by the Arab conquerors of Persia. Immigrant Parsis adopted the customs of the place where they had first been given shelter. Parsis follow distinct rites of passage that start at birth and then the ceremony of 'navjote' is performed to initiate the child into the Zoroastrian religion. Their marriage ceremony takes place after sunset, and they follow their own customary rites of marriage according to their religious text 'Avesta'. Priests perform religious rites during marriage and 'Hathevaro' (right hand-fastening) of bride and bridegroom is done. Amidst chanting of prayers from their religious texts, the marriage is completed. Only when the priests ('dastoorji') certify the marriage, is the marriage completed. Parsi priests cannot perform religious rites if a Parsi boy marries a non-Parsi girl or vice –versa.

Parsis believe in the Custom that a person can become a Parsi only by birth. Hence, if a person who is a Hindu, converts himself to Parsi, he would not be allowed to get any Parsi social and religious benefit. If a Parsi girl marries a non-Parsi boy, she will lose any rights in Parsi property and society. For example, J.R.D. Tata married a French Christian and she changed religion and was initiated into Zoroastianism, but she was not allowed to claim any benefit of the Parsi society. However, the children born out of their marriage are allowed entry into the Parsi fold. The converted Parsis are not allowed entry into their religious precincts or participation in any religious ceremonies.

### Custom Relating to Adoption–

Amongst Parsis, there is a well recognized 'Custom' of nominating a son or 'Palak' for adoption. There is no direct reference to this religious command in the existing Holy Avesta Scriptures, yet the Parsis practice it since ages. The 'Palak' adoption is not in the sense of a child being taken in a family with all the rights, social, religious or civil, of the adoptive father. It is not by way of conferring any right on the 'adopted' son, but it is the imposition of a duty on him – the duty of get performing the after-death ceremonies of the 'adoptive' father for the progress and onward journey of his Ruvan (soul) in the next world. Thus, we can see that Parsi adoption is altogether a different custom than others where the adoption confers all civil rights on the adopted son or daughter.

### Custom on Succession–

In matters of succession, Parsis have followed different 'Customs' till the codification of law during British times in 1865. Parsi Panchayats (or, Parsi Anjuman) were given the jurisdiction to adjudicate on issues relating to marital discord, succession, domestic strife, and land issues etc. When there is no successor of the deceased, the property passes on to the Panchayat, which gives monetary benefit to the Parsis in times of need, such as extreme poverty whereby a person could be forced to beg or go for prostitution. These Panchayats are composed of leading and influential members of the Parsi community. These bodies are also responsible for taking care of 'Towers of Silence', which are the last resting place of the Parsis.

Parsis residing in mofussil areas, during British rule, were governed by their 'Customary Law' whereas those living in Presidency areas were governed by English law. For example, Parsi woman, in a mofussil area, had only a right to maintenance when her husband died. In Presidency town, however, a widow had an absolute right to a one-third share of her husband's property. The daughter of the deceased, in Presidency areas, was treated at par with the son.

**Do you know**

The first Parsi settlement in India was in a village called "Sanjan" in Gujarat around the year 716 A.D. This place was then ruled by the Hindu chieftain, Jadi Rana. Rana gave permission to Parsis to settle down in his principality on four conditions: (a) that the Parsis would adopt the language of the country, (b) they would not bear arms, (c) their women would dress in Hindu fashion, (d) they would perform their marriage ceremonies after sunset in accordance with Hindu customs. They agreed to these conditions and settled there. However, they did not relinquish their own religion, i.e., Zoroastrianism and traditions, such as rites of passage.

### 4.1.3. Role of 'Custom' in Jewish Law

Jews are a small community in India who follow the religion of 'Judaism'. The main sources of Jewish law are the provisions of the 'Mosaic Code', set forth in the 'Pentateuch', which existed in the earliest times of Judaism and which is repeated with some modifications in "Deuteronomy". The Mosaic Code has a well-founded historical importance, and with subsequent adaptations to changed conditions of life, has affected the domestic life of the Jewish people all over the world. The later provisions of Jewish law are laid down in the "Talmud", a work which contains the traditional laws of the Hebrews. The marital law laid down in the 'Talmud' is an interpretation and enlargement of the Mosaic Code. It is divided into the "Mishna" and the "Gemara", the former of which contains the laws governing almost every action of the Hebrews, and the latter contains commentaries or expositions and discussions upon those laws. In the Middle Ages, statements of Jewish law were derived from the institutions of the 'Rabbis', but the principles of the old Rabbanical Code have been considerably modified in order that they may conform to the requirement of the laws of different countries in the world. The Rabbi himself is no longer a civil judge, but only a spiritual guide and preceptor of his congregation. In the Middle Ages, codes were compiled from the 'Talmud' for practical use, and the law was codified in the sixteenth century in a work styled "Schulchan Aruch" of which the third part, the 'Eben Ha-Ezer', contains the matrimonial laws of the Jewish people and has obtained a general authority on all questions of marriage and divorce.

### Custom Relating to Marriage–

The Jewish customary practice on marriage is different from the Christians and English people. The Roman Catholic Church considers marriage as a sacrament and as such indissoluble. Under English law, marriage is looked upon as a contract. Jewish law regards marriage not only as a civil contract, but as a relation between two persons involving very sacred duties. In the Mosaic laws, no fixed forms of concluding marriage are mentioned, but there is a distinction between the betrothed woman and the married woman. The betrothed woman

was called 'Arusha', and the married woman 'Nissua'. This practice was further evolved into certain legal formalities, and the act of marriage came to consist of two different parts, namely, the betrothment and the nuptials. A girl under the Jewish custom does not become betrothed unless the betrothal takes place with her consent. A girl who is a minor under the Hebrew law, that is to say, if she is below the age of thirteen years and a day, cannot betroth herself. The consent of the man is also necessary. The mere consent, however, of parties to marry each other is not sufficient to constitute a betrothal, because a certain act or formality is required by which the mutual consent is legally manifested. For this purpose, there are two special formalities. One of them is called 'Kaseph' (money), the other Sh'tar (written instrument). The betrothal by 'Kaseph' called 'Kaseph Kiddushim' consists in the man giving in the presence of two witnesses to the girl an amount of money or any other object of equal value, and at the same time saying in Hebrew, "Be thou consecrated to me", or "Be my wife", or "Be Mine" according to the laws of Moses and Israel. The witnesses must also be Jews.

The betrothment can only be dissolved through death or a formal bill of divorcement. Jewish customary law recognizes divorce. Four kinds of divorce were recognized by the old Rabbanical law: (a) divorce by mutual agreement, (b) divorce enforced upon the wife on the petition of the husband, (c) divorce enforced upon the husband on the petition of the wife, (d) divorce enforced by the Jewish court without the petition of either of the parties. A woman can ask for the bill of divorcement either after betrothal or marriage. The bill of divorcement has to be executed by the person who gives divorce to the person who has asked for it.

### Custom Relating to Succession & Inheritance–

Similarly, the customary practices of the Jews in matters of succession and inheritance are regulated by the 'Pentateuch' (religious text mentioned before) and by the Conciliation Committees formed by the Jews in their settlements. When the law related to succession was codified during the British regime, and was named as Indian Succession Act, 1925, the Jews did not say anything upon its application upon them. When some of the Jews discovered that the new law was not in consonance with their customary practices based on "Pentateuch", they petitioned to the State Government which has the power to exempt any race, sect or tribe from the operation of the Act. The British Government conceded this demand, and the Jews were remitted to the 'Pentateuch'.

**Do you know**

The origins of Indian Jews remain uncertain, but according to some accounts they may have come as emissaries from the Court of King Solomon. When the kingdom of Judaea was annihilated by the Roman Emperor Vespasian in

the year 70 A.D., the Jews started migrating to almost all parts of the world. Jews in India can be broadly classified into three categories: (a) the *Cochin Jews*, who arrived in India around 2500 years ago and settled down in Kerala as traders, (b) *Bene Israel Jews*, who arrived in India around 2100 years ago and settled in the states of Maharashtra and Gujarat, (c) *Baghdadi Jews*, who arrived in the late 18th century from Iraq, Iran, and Afghanistan and settled in Mumbai and Kolkata. They established their own small communities and built places of meeting and prayers called 'synagogues', read the holy Bible, and observed Sabbath and circumcision. It is interesting to know that the Bene Israel community, which is the largest Jewish community in India, believes that their forefathers were shipwrecked on India's shore while fleeing persecution during the second century B.C.

## INTEXT QUESTIONS 4.1

1. What are the Customs of Christians in India?
2. Why did the Parsis adopt the local Customs of India?
3. What are the Matrimonial Customs of the Jews in India?

**Fill in the Blanks**

1. ……. play an important role in the lives and legal system of Christians. (Customs/Law/Conventions)
2. Many Christians in India adopt ……. customs and practices. (Hindu/Parsi/Jews)
3. Among Parsis, there is a well recognized custom of maintaining a son or "palak" for ……. . (Adoption/Marriage/Divorce)

## 4.2 ROLE OF LEGISLATION AND JUDICIAL PRECEDENTS IN CHRISTIAN, PARSI, AND JEWISH LAW

In this Section of the lesson, we will discuss the role of legislation and judicial precedents in Christian, Parsi and Jewish law. As you might now be aware, legislations have played a major role in codifying the customary practices and new rules related to any area in one place. Similarly, the courts of superior jurisdiction have been given the authority to lay down judicial precedents in any case where the legislation is unable to provide solutions and customary practices have not been given recognition in the legislation. First of all, we would analyze the role of legislation and judicial precedents in Christian law.

### 4.2.1 Role of Legislation and Judicial Precedents in Christian Law

#### Legislation on Marriage–

Specific legislation relating to personal matters was codified during British rule in India. The term 'Indian Christian' is defined in the Christian Marriage Act, as a person professing the Christian religion and it includes Christian descendants of native Indians converted to Christianity, as well as ordinary converts. Baptism by itself does not amount to conversion. A convert has not only to be baptized, but also to profess Christianity according to Christian traditions. There are many special laws relating to Christians. The Indian Christian Marriage Act was codified in the year of 1872. This Act has consolidated and amended the laws relating to the solemnization of the marriages of persons professing the Christian religion in India. This Act has now been extended to Kanyakumari district and the Schencuttah taluk of the Tirunelveli-Kattabomman district of TamilNadu in 1995. The law on Christian divorce is codified by the name of The Divorce Act, 1869. This Act has been amended in 2001 whereby divorce by mutual consent is allowed.

#### Legislation on Adoption–

There is no specific legislation enabling or regulating adoption among Christians in India. Persons who wish to adopt a minor child usually approach the Court under the provisions of the Courts and Wards Act, 1890, to obtain an order of guardianship for the minor child. Orders under that, however, would not apply once the child becomes a major, thereby disentitling the child from the benefits enjoyed by an adopted son or daughter. This position has now been changed after the enactment of "Juvenile Justice (Care and Protection of Children) Act, 2000, read with the Guidelines and Rules issued by various State Governments under which now the Christians can also adopt children.

#### Legislation on Succession–

So far as matters relating to succession are concered, they are governed by the Indian Succession Act, 1925. This law governs intestate and testamentary succession of immovable property of Christians and Parsis. By virtue of the provisions of the Goa, Daman and Diu (Administration) Act, 1962, the Portuguese Civil Code is applicable in Goa. In Pondicherry, the French Civil Code still survives as per the provisions of the *Treaty of Cession, 1956.* Further, the Garos of Meghalaya are also not subject to this Succession Act. They follow their customary matrilineal system of inheritance.

#### Judicial Precedents–

The 'judicial precedents' relating to Christians are also very important to understand. In one decided case on marriage, the Madras High Court held that the consent of the father of a minor girl is mandatory to marry her. When the consent was not obtained from the father and the boy committed a fraud by

changing the year of birth of the girl to avoid taking the consent of her father, it was held not to be legal (*Rosalyn Mary* v. *Ravi Gnanaselvam*). In another decided case, the same court held that when no priest officiated the marriage ceremonies and the marriage did not take place in a church, the marriage would not be a marriage in the eyes of the Court even though documents were executed few weeks prior to the alleged marriage to provide for the dowry (*S. Selvaraj* v. *Martha Peter*).

In another decided case on divorce, the Supreme Court noted that the Divorce Act, 1869 confers jurisdiction on District Courts and High Courts in matrimonial matters. Unless the Act recognizes the jurisdiction, authority or power of Ecclesiastical Tribunal (sometimes called as Church Court), any order or decree passed by such Ecclesiastical Tribunal cannot be binding on the Courts which have been recognized under the Act to exercise power in respect of granting divorce and adjudicating in respect of matrimonial matters (*Molly Joseph v. George Sebastian*). On the question of whether slapping a wife by her husband amounts to cruelty, the Court has decided that merely slapping his wife after marriage does not amount to cruelty and this would not be a ground of divorce (*Agnel Valentine D'Souza* v. *Blanche Agnela Piedade*).

### 4.2.2. Legislation on the Parsi Law and its Judicial Review

#### Legislation on Marriage & Divorce–

The Indian Parliament has regulated Parsi marriages and divorces by enacting special laws for them entitled 'The Parsi Marriage and Divorce Act, 1936' which has been amended to some extent in 1988. This Act defines a Parsi as a person who is Parsi Zoroastrian. However, you might wonder about a situation when a Parsi boy marries a non-Parsi girl, what would be the religion of their children? Similarly, if a Parsi girl marries a non-Parsi boy, what would be the religion of their children? These questions are not answered by the Act. To know the answer, we would have to look at judicial precedents. In a case decided by the Bombay High Court, the Court observed that the children of a Parsi father and a non-Parsi mother are Parsi provided they are admitted to the Parsi religion and profess the Zoroastrian faith. The children of a Parsi mother and non-Parsi father, however, would not be Parsi (*Sir Dinshaw Maneckji* v. *Sir Jamshedji*).

According to this Act, Parsi marriage can be invalid if any of the three acts have been committed: (a) when the contracting parties are related to each other in any degrees of consanguinity or affinity (for example, a man shall not marry his sister's son's wife, and a woman shall not marry her sister's daughter's husband); (b) when the marriage is not solemnized according to Parsi form of ceremony called "Ashirvad" by the priest in the presence of two Parsi witnesses other than the priest himself; or (c) when the contracting parties are not adults, i.e., the male has not completed 21 years of age, and the female has not completed 18 years

of age. You might again think about a situation when a minor Parsi boy marries a Parsi girl and a child is born, would that child be illegitimate? The answer is given by this Act and it says that the child would be called legitimate.

### Procedures to be followed for solemnisation of Marriage–

The marriage contracted under this Act shall, immediately on the solemnization thereof, be certified by the officiating priest. The certificate shall be signed by the said priest, the contracting parties and two witnesses present at the marriage. The priest shall thereupon send such certificate together with a prescribed fee to be paid by the husband to the Registrar of the place at which such marriage is solemnized. Any priest knowingly and willfully solemnizing any marriage contrary to these conditions shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.

Ten grounds for divorce are also provided in this Act. Those are:

(a) non-consummation of marriage;

(b) unsound mind;

(c) bride was pregnant at the time of marriage;

(d) commission of adultery, rape, or unnatural offence;

(e) cruelty;

(f) infection by venereal disease or causing grievous hurt to each other;

(g) imprisonment of seven years;

(h) desertion for two years;

(i) separation from each other and no marital intercourse; and

(j) conversion to any other religion. One more ground has been added in the year of 1988, i.e., divorce by mutual consent. If the contracting parties are living separately for a period of one year or more, and they have not been able to live together, and they have mutually agreed that the marriage should be dissolved, such divorce may be granted by the court.

### Jurisdiction of the Courts–

Separate Courts are also constituted for the adjudication of Parsi matrimonial disputes. In each of the Presidency towns of Mumbai, Chennai, and Kolkata, Parsi Chief Matrimonial Courts are established in the High Courts of these cities. These Chief Matrimonial Courts are aided by five Parsi delegates who are residents of the city and are willing to express their opinion in Parsi matrimonial disputes. These delegates are appointed by the State government. Similarly, a Parsi Matrimonial Court can also be constituted at a place other than Presidency town, and those Courts are called Parsi District Matrimonial Courts.

### Law on Adoption–

The legislature has not passed any special legislation to deal with Parsi adoption, except Parsi Intestate Succession Act, 1865, wherein it did not recognize an adopted son as a Parsi heir. Therefore, Parsi couples wishing to adopt a child could not have done so except for religious purposes. The Court has accepted the customary practice of adoption, i.e., Palak for religious purposes (*Jehangir Dadabhoy* v. *Kaikhushru Kavasha*). However, Parsi couples wishing to adopt a child may do so under a new legislation, named 'The Juvenile Justice (Care and Protection of Children) Act, 2000'.

### Law on Succession–

Matters relating to Parsi succession are provided for in the Indian Succession Act, 1925. Before this Act was passed, there was Parsi Intestate Succession Act, 1865 which dealt with this issue. Now, Indian Succession Act has a separate Chapter III which deals with Parsi intestate succession. Intestate Succession means a succession where the deceased did not make any will before death.

## 4.2.3. Role of Legislation and Judicial Precedents in Jewish Law

### Law on Marriage and its Judicial Review–

There is no specific legislation for the marriages amongst the Jews in India, so the role of legislation has absolutely no significance. Unlike in the case of Christians, Parsis and Hindus, as also in the case of Muslim women, there is also no statute providing for any matrimonial relief, such as divorce and alimony. However, judicial precedents have helped Jewish law to evolve in India for a long time. In this section, we will give full focus on the role of judicial precedents in shaping Jewish law in India.

The Bombay High Court judgments have played a major role in developing Jewish law in India. For example, this Court has established the rule that the nature and incidence of a Jewish marriage and the matrimonial relief to which a Jewish husband or wife would be entitled, must be ascertained from their personal law (*Mozelle Robin Solomon* v. *Lt. Col. R.J. Solomon*). Matrimonial disputes, such as seeking divorce can also be settled by the Courts. The law to be applied in such cases is the Jewish law with such adaptations to the circumstances of the case as justice may require. In the event of any dispute, the custom of the Jewish community will be considered before any ruling on the matter may be pronounced (*Rachel Benjamin* v. *Benjamin Solomon Benjamin*).

Recognizing one of the Jewish customs, the Bombay High Court held that where a Jewish girl (Baghdadi Jew) went through betrothal ceremony, called Kaseph Kiddushim (it is one of the two steps of marriage, the other step being "Chuppah"), the girl may be entitled to get the betrothal cancelled if the

conditions of betrothal have not been fulfilled by the boy or the groom. Betrothal ceremony amongst Jews confers some of the rights and obligations of the married state. When the betrothal becomes void on non-fulfillment of its conditions, there is no need to execute a bill of divorcement to nullify the effect of the Kaseph Kiddushim ceremony (*David Sassoon Ezekiel* v. *Najia Noori Reuben*). The girl can marry another Jewish boy without getting a bill of divorcement from the earlier boy with whom she was betrothed.

In an interesting case of divorce, a Jewish husband filed a petition in the Mumbai High Court seeking divorce on two grounds: (a) obstinate refusal of conjugal rights during one whole year (b) insulting the father-in-law in the presence of the husband and insulting the husband himself. Since there was some uncertainty about the exact law applicable on the question of divorce claimed by the husband, the Court referred to Jewish customary practice in England and the U.S.A. as mentioned in a book written by Rev, M. Mielziner on the Jewish Law of Marriage and Divorce in ancient and modern times. In modern times, these grounds of divorce are called (a) desertion (b) cruelty. In this case, the Court found that the wife had not obstinately refused to cohabit as before and after the time in which cohabitation was not alleged, it was found that they had cohabited with each other. On the second ground also, the Court held that the wife had not insulted her father-in-law , rather she wanted to assert her views. When a wife speaks up in front of her father-in-law and husband, it does not amount to cruelty (*Bension Joseph Hayeema* v. *Sharon Bension Hayeema*).

### Law on 'Will'–

The Court has also examined the Jewish law on 'will' by which a person can transfer his property according to his own wishes to others. It was held that the subject matter of a gift or a 'will' must be definite, existing, and in possession. No uncertain or future property can validly form the subject of a gift or a 'will'. For example, a share of a share in a partnership property is indefinite. Delivery of the document containing the 'will' to the donee is essential in order to complete the transaction. A 'will' must be read or the contents thereof explained to the donee or the legatee or some of his agent. If any of these essential requirements is not complied with or observed, the 'will' cannot be enforced by the court (*Menahem Mesha* v. *Moses Bunin Menahem Messa*).

## ACTIVITY 4.2

1. Make a small collection of Statutes or Acts relating to Christians, Parsis, and Jews.
2. Visit the websites of different High Courts of India and try to find out some of the judgments on matrimonial issues of the Christians, Parsis, and Jews.

## INTEXT QUESTIONS 4.2

1. What are the main legislations enacted by the Indian Parliament regulating the Personal Law of Christians and Jews?
2. Discuss the importance of enacting legislation related to Parsi Law.
3. How have the 'Judicial Precedents' helped to evolve the Personal Law of Parsis and Jews in India?
4. Do you think that the legislations and 'Judicial Precedents' have important role in a Legal System and why?

**Fill in the Blanks**

1. The Indian Christian Marriage Act was codified in the year …… (1872/1876/1878)
2. The Law on Christian Divorce is codified by the name of 'The Divorce Act', …… . (1872/1869/1995)

**Write True/False**

3. The Indian Succession Act, 1925 governs Intestate and Testamentary Succession of immovable property of Christian and Parsis. (True/False)
4. The 'Judicial Precedents' have helped to evolve the personal law of Parsis and Jews in India. (True/False)

## 4.3. HYBRID LEGAL SYSTEM

The traditional concept of a 'Hybrid Legal System' is one in which more than one legal system co-exist. In other words, if a legal system is called a 'Hybrid Legal System', it would have common law system as well as civil law system or socialist legal system, customary legal system or religious system. Systems around the world certainly present diverse mixes – of religious law, indigenous custom, merchant law, canonical law, Roman law and judge made law (precedents). For example, the legal systems of the countries of Seychelles, South Africa, Louisiana (in the U.S.), Philippines, Greece, Quebec in Canada, Puerto Rico, Scotland and India follow 'Hybrid Legal System' as they have more than one main legal system in their overall legal system. International legal system can also be termed as 'Hybrid Legal System' as you would find common law as well as civil law principles in it. We can appreciate that in places like Asia, Africa, and other Islamic countries, powerful elements of customary law still remain and are in evidence in varying degrees. Sometimes, you may also find a term 'Mixed Legal System', which is also used to denote 'Hybrid Legal System' only.

You might wonder what amount of ratio would be required to make a legal system hybrid one, as the term 'hybrid' denotes mixing up of two or more

different species or genetic material. In law also, you can apply this, but the actual quantity cannot be prescribed with absolute detail. For example, take the States of Texas, California, and Louisiana in the United States. Texas and California have 'some' civil law in their legal systems, whereas in Louisiana, the amount of civil law is 'more'. In India, if you observe closely you would find that we follow mainly common law because we have the system of judicial precedents and public writs. But is it not also a fact that we have several commissions of Inquiry, administrative tribunals (traits of civil law), customary law, personal law of Hindus, Muslims, Jews, Parsis, and socialist law in Directive Principles of State Policy given in our Constitution?

At the genesis of the 'Hybrid Legal System' are the claims of a culture to preserve its own language, religion, historical experience and, not least, its laws and customs. Native legal system is hoped to be preserved with the adoption of this approach, in doing which the political superior has an important role to play. He may consider the costs and benefits of this approach. Whosoever wins in this political show of strength between a group which is willing to protect its native legal system and an other which is trying to maintain status quo, would influence the making of the hybrid system. For example, the French Canadians of Quebec did not allow the common law to prevail over this State of Canada and therefore even within Canada, you would find civil law system. India, Pakistan, Bangladesh have inherited a common law legacy from their colonial regimes. However, the developments in India, such as the establishment of Gram Nyayalayas (a native legal system now recognized by law), 'Lok Adalat' (native practice being followed in Gujarat for a long time, and which is now recognized by law), administrative tribunals, Matrimonial Courts for different religions etc. have established the effectiveness and acceptance of native and civil law systems.

## INTEXT QUESTIONS 4.3

1. What are the salient features of a Hybrid Legal System?
2. Name some of the countries which follow 'Hybrid Legal System'.
3. Do you think that International Legal System and the legal system of the European Union follow 'Hybrid Legal System'? Give two reasons.

**Write True/False.**

4. India, Pakistan and Bangladesh have inherited a Common Law legacy from their colonial regime. (True/False)
5. The 'Hybrid Legal System' is one in which more than one Legal System Co-exist. (True/False)
6. The term 'Mixed Legal System' is also used to denote 'Hybrid Legal System'. (True/False)

## WHAT YOU HAVE LEARNT

- Customary rules have been observed by Christians, Parsis and Jews in India for a very long time. Many of those rules are incorporated in the legislations passed by the Union/State legislature or given recognition by the Courts.
- Jews in India are governed by their own Customary Rules as there is no legislation for them in matters of family and matrimonial relations. However, the judiciary has recognized many of their Customary Rules contained in their religion and moral texts.
- Some of the examples of legislations relating to Personal laws of Christians and Parsis are :

  (a) The Indian Christian Marriage Act, 1872;

  (b) Indian Succession Act, 1925;

  (c) The Parsi Marriage and Divorce Act, 1936; and

  (d) Indian Divorce Act, 1869
- 'Hybrid Legal System' comprises of a blend of more than one Legal Systems. In the present day, no Legal System of the world is composed of only one type of legal system and in this regard, India is no exception.

## TERMINAL QUESTIONS

1. Discuss the role of 'Custom' in the Personal Law of Christians, Parsis and Jews. Do you think that the Custom does not play any role in their lives ?
2. Describe some of the salient features of the legislation on Personal Law for Christians and Parsis.
3. How is a 'Hybrid Legal System' different from other Legal Systems of the world ?
4. Assess the role of the Courts to recognize Customary Rules of Christians, Parsis and Jews..
5. Match the legislation and Customs in column 'A' with corresponding application in column 'B'

| A | B |
|---|---|
| (a) Indian Succession Act, 1925 | Parsi |
| (b) Ashirvad Ceremony | Jews |
| (c) Kaseph Kiddushim | Christians |
| (d) Indian Divorce Act, 1869 | Christians and Parsis |

## Project

Survey your District Town and identify 3-5 people belonging to Christians, Parsi and Jewish communities. Do not bother if you do not find any Parsis and Jewish persons in your District Town. But you will definitely find some Christian people. Try to know from them the customary rules which they have been following for a long time and have been recognized by the legislature or the courts.

| Sl. No | Name of the Person | Customary rules followed by them | Rules recognized by legislature/judiciary |
|---|---|---|---|
| 1 | | | |
| 2 | | | |
| 3 | | | |
| 4 | | | |
| 5 | | | |

## ANSWER TO INTEXT QUESTIONS

### 4.1

1. Customs of the Christians in India are :
   (a) minors cannot marry;
   (b) parties to a marriage must be knowing the consequences of marriage within prohibited degrees of relationship;
   (c) rule of linear primogeniture; and
   (d) adopting son-in-law by Kerala's Syrian Christians
2. Parsis adopted the local Customs of India because :
   (a) they were allowed to stay in India, at the time of their first arrival, on the condition that they would follow India's local custom of the place whey they were allowed to settle; and
   (b) they were not temporary settlers, but they had been a victim of religious persecution in their home land. So they adopted local custom due to long settlement and gave respect to the local customs.
3. The Matrimonial Customs of the Jews in India are :
   (a) marriage is regarded as a civil contract as well as a sacred commitment to perform some duties;

(b) a betrothed and married woman are two distinct phases and each one has a different meaning;

(c) four kinds of divorce are practiced; and

(d) mere consent of parties to marry is not enough, some legal formalities are necessary to be observed, such as 'Kaseph Kiddushim'

1. Customs
2. Hindu
3. Adoption

## 4.2

1. The main legislations enacted by the Indian Parliament regulating the Personal Law of Christians and Jews are :
   (a) The Indian Christian Marriage Act, 1872;
   (b) The Divorce Act, 1869;
   (c) Juvenile Justice (Care and Protection of Children) Act, 2000;
   (d) The Indian Succession Act, 1925;
   (e) The Parsis Marriage and Divorce Act, 1936; and
   (f) The Parsis Intestate Succession Act, 1865
2. After examining the legislation enacted for the Parsis on their personal law, it can be deduced that (a) the legislation has classified the vague customary rules of Parsis (b) all the rules have been codified at one place and now it is easy to locate the law (c) the legislation is authoritative and it is binding on all Parsis (d) if any Parsi would not follow any provisions of the legislation, they can be penalized.
3. The 'Judicial Precedents' have evolved the personal law of Parsis and Jews in India in the following ways :
   (a) the judiciary has recognized that the children of a Parsi mother and non-Parsi father would not be Parsi;
   (b) customary practice of adoption of Parsis is accepted by the court;
   (c) gift of property by Jews has been recognized in the form of 'will'; and
   (d) where the betrothal becomes void on non-fulfillment of its conditions, there is no need to execute a bill of divorcement to nullity the effect of the 'Kaseph Kiddushim'.

4. Yes, I think that the legislation and 'Judicial Precedents' have an important role in a legal system because : (a) if legislation would not have been there, the courts would face difficultly in applying the rules (b) it would become difficult for the common person to prove a customary rule in the courts of law (c) judicial precedents make law for the future in the like cases

**Fill in the Blanks**

1. 1872
2. 1869
3. True
4. True

## 4.3

1. The salient features of a 'Hybrid Legal System' are :
   (a) co-existence of more than one legal system;
   (b) ratio of the mixture of different legal system can not be pre-determined; and
   (c) it preserves the native legal system
2. Countries which follow hybrid legal system are :
   (a) Seychelles;
   (b) South Africa;
   (c) Philippines;
   (d) Greece; and
   (e) India
3. Yes, I think that International Legal System and the Legal System of the European Union follow 'Hybrid Legal System' because :
   (a) more than one type of legal system are found in it; and
   (b) these two systems are composed of various peoples, and cultures, so their traditional legal systems have also been given due place and recognition by it.
4. True
5. True
6. True

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# NORMATIVE FUNCTIONS OF LAW AND SOCIAL CONTROL

In this lesson you will be introduced to various kinds of norms or standards which help in keeping society in order. In your day-to-day life you will find various such examples. These norms, rules or standards maintain discipline in the society. For example, in every game which you enjoy such as Cricket, Hockey, Football, Table-Tennis etc., there are rules which every player has to observe. Similarly, in your family and school, there must be rules of behaviour with elders and younger members such as, punctuality in attending classes etc. At larger level, there exist the rules of marriage, adoption and succession, rules regarding trade and commerce etc. These rules are based on morals, religion, customs, public opinion etc. In modern time, law plays a very important role in regulation of the various interactions amongst human beings. However, the majority of laws are based on morals, customs, public-opinions etc. The laws which are not based on them face lot of resistance from the public and cannot be enforced for a long time.

## OBJECTIVES

After studying this lesson you will be able to:

- define 'Norms';
- distinguish between Legal Norms and other Norms;
- appreciate the role of Norms in the maintenance of social order;
- explain the role of law in social control;
- define 'Alternative Dispute Resolution' (ADR);
- describe the various forms of Alternative Dispute Resolution (ADR);
- appreciate the role of Lok Adalats in resolving disputes; and
- explain the role of Supreme Court in bringing socio-economic changes in society.

## 5.1 CONCEPT OR MEANING OF NORMS

Social 'Norms' are the beliefs of society about how members should behave in a given context. Sociologists describe 'Norms' as informal understandings that govern society's behaviour.

In simple terms, a 'Norm' signifies a standard of behaviour to be followed by the society. These standard are considered to be necessary to maintain source order. There are a number of 'Norms' creating institutions. Some of them are: religion, ethical standard, customs and usages and law.

In ancient times, religion has played the most significant role in regulating society. Religion and Law were indistinguishable. Later, some other institutions came into existence to set 'Norms'.

All societies impose social control on their citizens to some degree. They monitor and regulate behaviour formally and informally. In large-scale societies, the most visible mechanisms are laws, courts, and police. However, Law is only one aspect of social control and is usually the least effective one. Small- scale societies maintain social control without the complex legal institutions with which we are familiar. However, this does not mean that they are without laws.

Key to understand a society's system of social control is understanding the social norms upon which it is based. These are the commonly held conceptions of appropriate and expected behaviour in a society. 'Norms' can and do change over time. In tradition-bound societies, 'Norms' generally change very slowly. In large, multi-ethnic societies, 'Norms' change rapidly.

Often a society's 'Norms' change but the laws relating to them have a long delay in catching up. The most effective form of social control is not laws, police, and jails. Rather, it is the realisation or acceptance of the moral codes by the members of society.

### INTEXT QUESTIONS 5.1

1. Define 'Norm'.
2. Name two 'Norms' which regulates social behaviour.

## 5.2 ROLE OF NORMS IN MAINTENANCE OF SOCIAL ORDER

'Norms' play a crucial role in the maintenance of social order. In every sphere of life we find some standards to regulate our behaviour. For example, there are moral norm or standards to regulate the interactions between individuals such as not to tell a lie, help one another in case of need etc. Similarly, there

are Social Norms prevalent in various societies with regard to marriage, adoption etc. Similarly, there are practices which act as 'Norms' to be followed in particular trade or business. Law also creates 'Norms'. In modern times, the role of Law in norm-creation is increasing day by day. However, you will notice that the majority of Legal Norms are based on the practices or standards followed in various fields in the society such as social, moral, trade, profession and business etc. It has been seen that Legal Norms which are supported by the above, are followed more often than the Norms which are against them. However, sometimes law has to intervene into the in moral social practices prevalent in the society and pass laws to curb these practices and create new norms. Laws to curb the evil of Dowry, Untouchability, *Sati* System are such examples.

## INTEXT QUESTIONS 5.2

**Write True/False:**

1. Norms play a crucial role in the maintenance of social order. (True or False)
2. Law also creates Norms. (True or False)
3. In modern times the role of Law in creating 'Norms' is increasing day by day. (True or False)

## 5.3 ROLE OF LAW IN SOCIAL CONTROL

**Socio-Economic Goal of the Constitution.** The independence of the country heralded a new era. The Constitution laid down the goals which the nation committed to achieve. The socio economic goal and the founding faiths of our Nation were incorporated in the Constitution. It enjoined the law the function to make environmental adaptations of the existing legal system, feeling the needs and the wants of the people, evolving principles of law and legislative formulations and statutory institutions which will harmonize with the urgencies of our times, and translating into action the mission of the Constitution. Thus, the goals set by the Constitution made it imperative to bring about socio-economic changes.

The driving force of social change in the Indian context is the re-discovery of the goals of our Freedom Struggle, the realization of our national identity, the reflection on our founding faiths and fighting creeds, the strengthening of our resolves and launching on our future with a flaming spirit, at once authentic, impatient and adventurous. A militant awareness that we are free people with commitment to social justice still running our affairs on a legal system, self-divided and caught in a spiritual crisis, is the beginning of the mission. The

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political declaration of the independence is our incarnation to a nation; the economic declaration of independence is battling for self-expression, marching from the Constitution towards law-in-action. Frankly, the establishment is afflicted with the pathology of split personality and loss of identity and amnesia of our tryst with destiny. A powerful, planned comprehensive legal Protestantism, radical enough to abandon the spell of five-star prosperity and to wage war on mass poverty and social disability is the demand on the Indian jurist.

**Socio-economic Changes and Legislative Reforms of Land Law** In pursuance of the declared objective of the Constitution, legislative process started for bringing about socio economic changes. The economy of the country being based in most part on land and it also governed the social structure, the land policy received priority. The excessive pressure on cultivable land, the concentration of land proprietorship, the miserable economic condition of the peasantry and their exploitation and urgent need to increase production and to modernise methods of agriculture and channels of credit – all these have had a cumulative effect on land tenure and land reform legislation. The attention of independent India was, therefore engaged immediately and primarily towards overhauling land legislation to meet the needs of the time. Consequently, all States have enacted land reforms legislations. Legislation has been enacted for the removal of the intermediaries between the tiller of the soil and the State, consolidation of holdings land ceiling, eradication of rural indebtedness and institutional sources for agricultural credit. Schemes, projects and programmes for the improvement of agriculture horticulture and animal husbandry have been launched. For all-round rural uplift Village-panchayats have been established, vigorous literary drives have taken place, village and cottage industries have been developed and numerous other similar programmes have been worked out and given effect to.

### 5.3.1 Labour Law

The second great concern of the Nation was to secure the welfare of the labour and industrial peace. In India, till the First World War there was almost absence of labour legislation. It was between the 1919 and 1939, that some essential legislation for the protection of labour was introduced. Some legislation was enacted after the Second World War and before the country achieved political independence. This was quite inadequate in view of the new socio-economic changes. After independence numerous labour legislations have been enacted to ameliorate the condition of the labour. The new labour laws are primarily concerned with the welfare of the working class and attempt to bring industrial peace which will in its turn accelerate productive activity of the country resulting in its prosperity.

Chief Justice Gajendragadkar emphasized the necessity of adjusting the labour law to the new social requirements when he wrote:

Industrial Disputes Act, 1947 is the pioneer and potential legislation on the subject. The Act goes to free the parties from the shackles of their contractual stipulations and throws open the issues relating to the wages, allowances, compensation for retrenchment, closure, bonus and other fringe benefits for determinate afresh on broad principles of fairness and equity and in a forum different from the ordinary civil court. Strikes, lockouts, closures, wages during strikes and lockouts and lay offs, unsettling or pre-empting disciplinary action taken or proposed by the employer-these and numerous matters lie within the ambit of this legislation. This has been followed by a host of legislations such as the Minimum wages Act, 1948, the Employees State Insurance Act, 1948, the Industrial Disputes (Banking and Insurance Companies) Act, 1949, the Apprentices Act 1961, the Maternity Benefits Act, 1961, etc.

The Labour Legislation in India has now become an important part of that social and economic legislation which derives its inspiration from the recognition of the wider responsibilities which the state has undertaken to protect the economically weaker sections of the community.

### 5.3.2 Family Law

Another important field where legislative activity was called for is family law. The law was lagging much behind the social advancement. The influence of the social reforms and emergence of new religious sects with progressive and reformative outlook, economic factors, rapid scientific and industrial development had necessitated the change in law. The British Government did not take any substantial legislative measures in this regard for political reasons. After the independence urgent need to change the law in this field was felt. However, there were conservative sections also for whom any change in the law amounted to inference in religious matters. Therefore some social preparedness was also necessary for the reform. Four major Acts i.e, Hindu Marriage Act, 1955, Hindu Succession Act, 1956, Hindu Adoptions and Maintenance Act, 1956 and Hindu Minority and Guardianship Act, 1956 were passed. The Special Marriage Act, 1954 also to some extent, covers the field. Hindu Marriage Act has been amended a number of times to meet the changing social outlook and requirements. These Acts while not making complete break from the past introduce radical changes conforming to new ideas and requirements. Now marriage tie is not voidable. New matrimonial reliefs have been provided. The rights of females in the matters of succession and proprietary rights have been made equal to that of males. Position of female has been improved in the matter of adoption and

guardianship also. Rights of adoptees and minors have been firmly secured. Dowry Prohibition Act, 1961 Amended by Dowry Prohibition (Amendment) Act, 1986 has been passed to deal with the social evil of dowry. Family Courts Act, 1984 has been enacted for the settlement of matrimonial disputes.

**Removal of social evils and disabilities**. Acts have been passed to eradicate many other social evils and disabilities like the U.P. Removal of Social Disabilities Act, 1947; the West Bengal Hindu Social Disabilities Removal Act, 1948; the Untouchability offences Act, 1955; renamed as the Protection of Civil Right Act have been passed to remove the evil of Untouchability. The evil practice of Devadasis, sacrifice of animals in religious places and prohibition of the entry to temples to certain section of the society have been removed or regulated by Madras Animal Sacrifices Act, 1950, Madras Prevention of Devadasis Act, 1947 Madras Temple Entry Act, 1947, Bombay Hindu Places of Public Worship (Entry Authorization) Act, 1956 and many other similar Acts have been passed for social reform and to reconstruct the Hindu Social order.

### 5.3.3 Persons with Different Abilities

The Parliament of India has enacted four legislations for Persons with Disabilities viz. (i) Persons with Disability. (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, which provides for education, employment, creation of barrier free environment, social security, etc. (ii) National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability Act, 1999 has provisions for legal guardianship of the four categories and creation of enabling environment for as much independent living as possible. (iii) Rehabilitation Council of India Act, 1992 deals with the development of manpower for providing rehabilitation services.

The Mental Health Act, 1987 deals with mental health authorities, psychiatric hospitals and nursing homes admission and detention in psychiatric hospital or nursing homes inspection, discharge, leave of absence and removal of differently abled persons.

### 5.3.4 Supreme Court and Socio Economic Changes

Supreme Court of India, the apex Court of justice as guarantor and protector of the fundamental rights and interpreter of the Constitution, has a constitutional duty to secure socio-economic and political justice to all the citizens of the country. It is to be noted that the Constitution is not merely a legal but basically a political document. Therefore, interpretation of important constitutional questions involves policy formulation. Here lies the essence of judicial activism.

The Supreme Court with judicial activism has interpreted the law to further the cause of socio-economic reforms. It has not been slow to respond to the requirement of implementing the socio economic reforms and has been moulding its remedies to meet new interaction and has increasingly come to direct the method of implementing such reforms and to supervise the working of these programmes. In fact, n recent years the Supreme Court has brought about more far-reaching changes, in this lesson, it is not possible to mention all but only a very brief reference to such changes in some of the fields may be stated.

**Interpretation of the Constitution.** Under the Constitution, the meaning of other authorities' occurring under Article 12 has been considerably widened to cover more and more institutions and organisations within the term 'State' and to prevent them from acting in violation of Fundamental Rights. There has been a gradual broadening of the view of the Supreme Court in the matter of civil liberties. With Menaka Gandhi v. Union of India a new trend has emerged. After that the Court began to expand the frontiers of fundamental rights and of natural justice through a variety of creative interpretations inspired by judicial activism. In the process, the judges rewrote many parts of the Constitution. For example, the right to life and personal liberty in Article – 21, was converted 'de facto' and 'de jure' into a due process clause, contrary to the intention of the makers of the Constitution. This right has soon expanded to encompass many other rights. This has given rise to a new kind of prison jurisprudence by creating new rights to prisoners under Article – 21. In this new prison jurisprudence right to speedy trial, right to free legal service right to human dignity, right against torture have been made some of the components of the fundamental rights.

Directive Principles of States Policy have been growingly given importance by the Court. It has been held that there is no conflict between the Directive Principles and a Municipality to make arrangements for public sanitation under the supervision of the Court.

The various decisions of the Apex Court will go a long way to promote social justice in this country.

**Public Interest Litigation (PIL)** is another action of great importance on the part of the Supreme Court in its introduction. In view of its importance and growingly increasing ambit it has been discussed separately .

**Interpretation of Welfare Legislation.** Legislation meant for the rural economic uplift or for the welfare of the weaker sections of the society has been liberally interpreted in their favour. The Supreme Court has upheld the validity of land reform laws enacted by several States.

Sometimes legislature and judiciary have pulled in different directions. It is also to be noted that there have been occasions where the two agencies of social and economic development i.e. the Legislature and the Judiciary have pulled in different directions. One such important matter has been the right to property. Its interpretation by the Supreme Court was found by the Parliament to be standing in the way of economic development. Thus, Constitution Amendment Acts were passed from 1951 to 1964 clarifying that the right to compensation given by Article 31 of the Constitution was not justiciable in a court of law and that the quantum of compensation as fixed by legislature was final. Further, amendments have also been made to protect certain categories of law from the application of Article 31. Similarly, the legislative efforts have been on to restrict the definition of 'industry' as laid down in Bangalore Water Supply case. However, there have not been many such occasions. Full effect of legal changes are yet to be realised. By and large, Legislature and the Court both have enacted and moulded and shaped the law respectively to achieve the goal of social, economic and political justice enshrined in the Constitution However, due to ignorance and illiteracy of the masses and lack of adequate and effective enforcing machinery full impact of the changes is still to be realised

## INTEXT QUESTIONS 5.3

1. Name any three Acts which helped in improving the condition of working labourer.
2. Name any two Acts in the area of Family Law which helped in improving the condition of women in the society.

## 5.4 ALTERNATIVE DISPUTE RESOLUTION (ADR)

Alternative Dispute Resolution (ADR) (also known as external dispute resolution in some countries, such as Australia) includes dispute resolution processes and techniques that act as means for disagreeing parties to come to an agreement short of litigation. It is a collective term for the ways that parties can settle disputes, with (or without) the help of a third party. Despite historic resistance to ADR by many popular parties and their advocates, ADR has gained widespread acceptance among both the general public and the legal profession in recent years. In fact, some courts now require some parties to resort to ADR of some type, usually mediation, before permitting the parties' cases to be tried (indeed the European Mediation Directive (2008) expressly contemplates so-called "compulsory" mediation. The rising popularity of ADR can be explained by the increasing case load of traditional courts, the perception that ADR imposes fewer

costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute.

### 5.4.1 Arbitration and Conciliation Act, 1996

#### Arbitration

The process of arbitration can start only if there exist a valid Arbitration Agreement between the parties prior to the emergence of the dispute. As per Section 7, such an agreement must be in writing. The contract regarding which the dispute exists, must either contain an arbitration clause or must refer to a separate document signed by the parties containing the arbitration agreement. The existence of an arbitration agreement can also be inferred by written correspondence such as letters, telex, or telegrams which provide a record of the agreement. An exchange of statement of claim and defence in which existence of an arbitration agreement is alleged by one party and not denied by other is also considered as valid written arbitration agreement.

Any party to the dispute can start the process of appointing an arbitrator and if the other party does not cooperate, the party can approach the office of Chief Justice for appointment of an arbitrator.

Except for some interim measures, there is very little scope for judicial intervention in the arbitration process. The Arbitration Tribunal has jurisdiction over its own jurisdiction. Thus, if a party wants to challenge the jurisdiction of the arbitration tribunal, it can do so only before the Tribunal itself. If the Tribunal rejects the request, there is little the party can do except to approach a court after the Tribunal makes an award. Section 34 provides certain grounds upon which a party can appeal to the principal civil court of original jurisdiction for setting aside the 'award'.

The period for filing an appeal for setting aside an award is over, or if such an appeal is rejected, the award is binding on the parties and is considered as a decree of the court.

The Arbitration and Conciliation Act, 1996 has been enacted to accommodate the harmonisation mandates of UNCITRAL Model. To streamline the Indian legal system the traditional Civil Law known as Code of Civil Procedure, (CPC) 1908 has also been amended and Section 89 has been introduced. Section 89 (1) of CPC provides an option for the settlement of disputes outside the court. It provides that where it appears to the court that there exist elements, which may be acceptable to the parties, the court may formulate the terms of a possible

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settlement and refer the same for Arbitration, Conciliation, Mediation or Judicial Settlement.

Due to extremely slow judicial process, there has been a big thrust on Alternate Dispute Resolution mechanisms in India. While Arbitration and Conciliation Act, 1996 is a fairly standard western approach towards ADR, the Lok Adalat system constituted under National Legal Services Authorities Act, 1987 is a uniquely Indian approach.

### Conciliation

'Conciliation' is a less formal form of Arbitration. This process does not require existence of any prior agreement. Any party can request the other party to appoint a conciliator. One conciliator is preferred but two or three are also allowed. In case of multiple conciliators, all must act jointly. If a party rejects an offer to conciliate, there can be no conciliation.

Parties may submit statements to the conciliator describing the general nature of the dispute and the points at issue. Each party sends a copy of the statement to the other. The conciliator may request further details, may ask to meet the parties, or communicate with the parties orally or in writing. Parties may even submit suggestions for the settlement of the dispute to the conciliator.

When it appears to the conciliator that elements of settlement exist, he/she may draw up the terms of settlement and send it to the parties for their acceptance. If both the parties sign the settlement document, it shall be final and binding on both.

Note that in USA, this process is similar to Mediation. However, in India, Mediation is different from Conciliation and is a completely informal type of ADR mechanism.

## 5.4.2 Lok Adalat

Etymologically, Lok Adalat means "People's Court". India has had a long history of resolving disputes through the mediation of village elders. The current system of Lok Adalats is an improvement on that and is based on Gandhian principles. This is a non-adversarial system, whereby mock courts (called Lok Adalats) are held by the State Authority, District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee, or Taluk Legal Services Committee, periodically for exercising such jurisdiction as they thinks fit. These are usually presided by retired judge, social activists, or members of legal profession. It does not have jurisdiction on matters related to non-compoundable offences.

While in regular suits, the plaintiff is required to pay the prescribed court fee, in Lok Adalat, there is no court fee and no rigid procedural requirement (i.e. no need to follow process laid down by Indian Civil Procedure Code or Indian Evidence Act, which makes the process very fast. Parties can directly interact with the judge, which is not possible in regular courts.

Cases that are pending in regular courts can be transferred to a Lok Adalat if both the parties agree. A case can also be transferred to a Lok Adalat if one party applies to the court and the court sees some chance of settlement after giving an opportunity of being heard to the other party.

The focus in Lok Adalats is on compromise. When no compromise is reached, the matter goes back to the court. However, if a compromise is reached, an award is made and is binding on the parties. It is enforced as a decree of a civil court. An important aspect is that the award is final and cannot be appealed, not even under Article 226 of the Constitution of India [which empowers the litigants to file Writ Petition before High Courts] because it is a Judgement by consent.

All proceedings of a Lok Adalat are deemed to be judicial proceedings and every Lok Adalat is deemed to be a Civil Court.

### Permanent Lok Adalt for public utility services

In order to get over the major drawback in the existing scheme of organisation of Lok Adalats under Chapter VI of the National Legal Services Authorities Act, 1987, in which if the parties do not arrive at any compromise or settlement, the unsettled case is either returned back to the court or the parties are advised to seek remedy in a court of law, which causes unnecessary delay in dispensation of justice: Chapter VI A was introduced in the Legal Services Authorities Act, 1987, by Act No.37/2002 with effect from 11-06-2002 providing for a Permanent Lok Adalat to deal with pre-litigation, conciliation and settlement of disputes relating to Public Utility Services, as defined u/sec.22 A of the Legal Services Authorities Act, 1987, at pre-litigation stage itself, which would result in reducing the work load of the regular courts to a great extent.

The Lok Adalat is presided over by a sitting or retired judicial officer as the chairman, with two other members, usually a lawyer and a social worker. There is no court fee. If the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the Lok Adalat. The procedural laws, and the Evidence Act are not strictly followed while assessing the merits of the claim by the Lok Adalat.

Main condition of the 'Lok Adalat' is that both parties in dispute should agree for settlement. The decision of the Lok Adalat is binding on the parties to the

dispute and its order is capable of execution through legal process. No appeal lies against the order of the 'Lok Adalat'.

'Lok Adalat' is very effective in settlement of money claims. Disputes like partition suits, damages and matrimonial cases can also be easily settled before Lok Adalat as the scope for compromise through an approach of give and take is high in these cases.

Lok Adalat is a boon to the litigant public, where they can get their disputes settled fast and free of cost.

### 5.4.3 ADR for Grass Route level

To combat the longstanding grievance of *Aam Aadmi* with respect to access to justice, we need to revitalize the ancient times practice of decentralized and participatory justice and resurrect '*Nyaya Panchayats*' in the villages of every state in India. The formulation of these village level dispute resolution forums will lead to the fulfilment of the constitutional goal under Article 39A of the Constitution. Nyaya Panchayats will empower more than 70% of the total India population, which resides in villages to exercise control over the nature of proceedings (to be conducted in local language thereby disrupting linguistic barriers) to amicably arrive at a mutually agreeable solution via the ADR methodology. The reinstatement of these village courts in every Panchayat area of the village will lead to doorstep access to low cost justice by the common man and positively impact the village economy in the long run. These Nyaya Panchayats will function as a "*Community Based ADR*" mechanism which is designed to be independent of a conventional court system that may be biased, expensive, distant or otherwise inaccessible to the economically disadvantaged rural population.

The Nyaya Panchayat Bill, 2006 reflects that the Panchayat should have five members, including one woman and one reserved post rotating between SC/ ST and OBC, which are elected directly by the voters of a territorial constituency. Reservation for women and socially backward classes in the village court will pave the path for equal opportunity to every person regardless of their caste and fair dispensation of justice. There is no requirement for members to possess legal education as a prerequisite to contest for elections for the Nyaya Panchayat. Induction of one legally trained person would inspire confidence in the rural people and safeguard the application of substantive law.

Furthermore, to avoid partisan influences and undue political considerations from creeping into dispute resolution process, it must be ensured that no member is affiliated to any national or state political party. To ensure the accountability of Nyaya Panchayats to the state, the proposed legislative framework should

include a provision for documentation of disputes resolved by the Panchayat, and provide for submission of these reports to the State Government. Another significant advance towards instilling ADR at grass root level may be made by the establishment of 'Gram Nyayalayas' as the lowest tier of judiciary in the rural areas. The State Government is expected to establish one or more Gram Nyayalayas for every Panchayat or group of contiguous Panchayat at an intermediate level. Each 'Gram Nyayalaya' shall be headed by a Nyayaadhikari, who shall have the qualifications of a first class magistrate and possess exclusive and original jurisdiction over certain civil and criminal disputes. The key highlight of this Bill is that it seeks to introduce '*Court Annexed ADR*' process at the village level by way of these Gram Nyayalayas. In civil disputes the Nyayaadhikari will be empowered to adjourn proceedings and allow for conciliation between parties, subject to the rules devised by High Court. Furthermore, petty disputes such as the disputes over agricultural land, the rights to cultivation and grazing on common pastures, disputes over cultivation, the right to draw water from canals or tube wells or incidental questions arising in villages are most suited to be determined by ADR procedure at village level. Even in the 73rd Constitution Amendment Act, which conferred constitutional sanctity to Panchayati Raj Institutions there was no specific mention of establishing a 'Nyaya Panchayat'. After the instant amendment, few States such as Bihar, Himachal Pradesh, Punjab, Uttar Pradesh and West Bengal inserted the provision for 'Nyaya Panchayats' in their new Panchayati Raj Acts.

Now there shall be social workers at the village level with the required qualification prescribed by the High Court. Hence, this bill, if enacted, will decentralize the tiers of justice delivery and reduce the burden of cases on the lower judiciary thereby paving the path for speedier and inexpensive justice for the economically and socially underprivileged people in India.

## INTEXT QUESTIONS 5.4

1. Explain the role of Lok Adalats in providing cheaper and speedy justice to the people.
2. Write the full form of ADR?
3. Define 'Conciliation'.

## WHAT YOU HAVE LEARNT

- In this lesson you have studied the concept of 'Norms'. 'Norms' are the standards which regulate human activities in the society. They originate mainly from religion, customs and usages, moral standards and public

opinion. Law is one of such source. In modern society, law plays the most significant role in regulating human interactions with one another. Law covers all the major activities of human beings. However, majority of them are based on morals, public opinions etc.

- In India, Law has played a crucial role in reforming the society. Labour law, Land Reform Laws, laws relating to Marriage, Guardianship, Succession, Adoption, Laws providing for equal opportunities to persons with disabilities, Laws relating to elderly persons are some such examples.
- To reduce the backlog of cases in Courts and to provide less expensive and speedy justice, Alternative Dispute Resolution (ADR) is now being encouraged. The Parliament of India has passed the Arbitration and Conciliation Act, 1996 and has amended the Civil Procedure Code, 1908 for this purpose. To provide speedy justice at the grass route level, the Legal Services Authorities Act, 1987 has been passed to establish Lok Adalats. To provide justice at the door steps of village people the Gram Nyayalaya Act, 2009 has also been passed.
- The Supreme Court of India, the apex Court of justice through a variety of creative interpretations inspired by judicial activism, has played a very important role in bringing socio-economic changes in the society and in improving the conditions of women and poor sections of society.

## TERMINAL QUESTIONS

1. Examine the significance of various types of 'Norms' in regulating the society.
2. Explain the various sources of Law.
3. Discuss the role of Law as an instrument of social control, also evaluate the inter-relationship between Law and other Norms.
4. Evaluate the role of Law in social reforms with suitable examples.
5. What is Alternative Dispute Resolution? Discuss its significance in providing speedy justice.
6. How Social Norms and Moral Norms influence Legal Norms?
7. What are different types of ADR mechanisms for solving disputes.
8. Write short note one: (a) Labour Law (b) Family law (c) Customs (d) Lok Adalat.

## ANSWER TO INTEXT QUESTIONS

### 5.1

1. In simple terms, a 'Norm' signifies a standard of behaviour to be followed by the society.
2. Two examples of 'Norms' of social behaviour are:
   (i) Norms related to marriage; and
   (ii) Norms related to inheritance

### 5.2

1. True
2. True
3. True

### 5.3

1. The three Acts are:
   (i) The Factory Act, 1948
   (ii) The Industrial Disputes Act, 1947 and
   (iii) The Workmen Compensation Act, 1923
2. The two Acts are:
   (i) Hindu Marriage Act, 1955 and
   (ii) Hindu Succession Act, 1956

### 5.4

1. In Lok Adalats, the technicalities of procedural law are not insisted upon. The matter or dispute is resolved through consensus instead of adversarial litigation. This helps in reducing the cost of litigation and in less amount of time as compared to regular Courts. In short, the justice delivered is speedyand cheaper.
2. Alternative Dispute Resolution.
3. 'Conciliaiton' is a less formal form of Arbitration. This process does not require existence of any prior agreement. Any party to a dispute can request the other paty to appoint a conciliator. If a party rejects an offer to conciliate, there can be no conciliations.

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# PRINCIPLES OF NATURAL JUSTICE

In this lesson you will be introduced to the concept of 'Natural Justice'. Natural Justice in simple terms means the minimum standards or principles which the administrative authorities should follow in deciding matters which have the civil consequences. There are mainly two Principles of Natural Justice which every administrative authority should follow whether or not these are specifically provided in the relevant Acts or rules. Principles are:

1. No one should be the judge in his/her own case
2. Each party should be given the opportunity to be heard

## OBJECTIVES

After studying this lesson youwill be able to :

- Define the term 'Natural Justice';
- Discuss the various aspects of the 'Rule Against Bias';
- Analyse the 'Rule of Fair Hearing';
- Understand the meaning of term 'Speaking Order'; and
- Identify the 'Exceptions' to the Rule of Natural Justice.

## 6.1 CONCEPT OF NATURAL JUSTICE

Natural Justice implies fairness, reasonableness, equity and equality. Natural Justice is a concept of Common Law and it is the Common Law world counterpart of the American concept of 'procedural due process'. Natural Justice represents higher procedural principles developed by judges which every administrative agency must follow in taking any decision adversely affecting the rights of a private individual.

Natural Justice meant many things to many writers, lawyers and systems of law. It is used interchangeably with Divine Law, Jus Gentium and the Common Law of the Nations. It is a concept of changing content. However, this does not mean that at a given time no fixed principles of Natural Justice can be indentified. The principles of Natural Justice through various decisions of courts can be easily ascertained, though their application in a given situation may depend on multifarious factors. In a Welfare State like India, the role and jurisdiction of administrative agencies is increasing at a rapid pace. The concept of Rule of Law would loose its validity if the instrumentalities of the State are not charged with the duty of discharging these functions in a fair and just manner.

The principles of natural justice are firmly grounded under various Article of the Constitution. With the introduction of the concept of substantive and procedural due process in Article – 21 of the Constitution all that fairness which is included in the principles of natural justice can be read into Article – 21 when a person is deprived of his life and personal liberty In other areas it is Article – 14 which incorporates the principles of natural justice. Article – 14 applies not only to discriminatory class legislation on but also to arbitrary or discriminatory State action. Because violation of natural justice results in arbitrariness therefore violation of natural justice is violation of Equality Clause of Article – 14. Therefore, now the principle of natural justice cannot be wholly disregarded by law because this would violate the fundamental rights guaranteed by Articles – 14 and 21 of the Constitution.

There are mainly two Principles of Natural Justice. These two Principles are:

***'Nemo judex* in *causa sua'*.** No one should be made a judge in his own cause and the rule against bias. 'Audi alteram partem' means to hear the other party or no one should be condemned unheard.

## INTEXT QUESTION 6.1

1. Define 'Natural Justice'.
2. What is the constitutional basis of the principles of Natural Justice.
3. State two main principles of Natural Justice.

## 6.2 RULE AGAINST BIAS

'Bias' means an operative prejudice whether conscious or unconscious in relation to a party or issue. Therefore, the 'Rule Against Bias' strikes against those factors which may improperly influence a judge in arriving at a deci-sion in any particular case. The requirement of this principle is that the judge must

be impartial and must decide the case objectively on the basis of the evidence on record. Therefore if a person, for whatever reason, cannot take an objective decision on the basis of evidence on record he shall be said to be biased. A person cannot take an objective decision in a case in which he/she has an interest for, as human psychology tells us, very rarely can people take decisions against their own interests. This rule of disqualification is applied not only to avoid the possibility of a partial decision but also to ensure public confidence in the impartiality of the administrative adjudicatory process because not only must "no man be judge in his/her own cause" but also "justice should not only be done but should manifestly and undoubtedly be seen to be done". Minimal requirement of natural justice is that the authority must be composed of impartial persons acting fairly and without prejudice and bias. A decision which is a result of bias is a nullity and the trial is "Coram non-judice". Inference of bias, therefore, can be drawn only on the basis of factual matrix and not merely on the basis of insinuations, conjectures and surmises. Bias manifests variously and may affect the decision in a variety of ways.

### 6.2.1 Personal Bias

Personal Bias arises from a certain relationship equation between the deciding authority and the parties which incline him/her unfavourably or other-wise on the side of one of the parties before him/her. Such equation may develop out of varied forms of personal or professional hostility or friendship. How-ever, no exhaustive list is possible.

In a case, the Supreme Court quashed the selection list prepared by the Departmental Promotion Committee which had considered the confidential reports of candidates prepared by an officer, who himself was a candidate for promotion.

However, in order to challenge administrative action successfully on the ground of 'personal bias', it is essential to prove that there is a "reasonable suspicion of bias" or a "real likelihood of bias". "Reasonable suspicion" test looks mainly to outward appearance, and "real likelihood" test focuses on the court's own evaluation of possibilities; but in practice the tests have much. in common with one another and in the vast majority of cases they will lead to the same result. In this area of bias the real question is not whether a person was biased. It is difficult to prove the state of mind of a person. Therefore, what the Courts see is whether there is reasonable ground for believing that the deciding officer was likely to have been biased. In deciding the question of bias judges have to take into consideration the human possibilities and the ordinary course of human conduct. But there must be real likelihood of bias and not mere suspicion of bias before the proceedings can be quashed on the ground that the person

conducting the proceedings is disqualified by bias. The apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension and vague suspicion of whimsical, capricious and unreasonable people.

### 6.2.2 Pecuniary Bias

The judicial approach is unanimous and decisive on the point that any financial interest, howsoever small it may be, would vitiate administrative action. The disqualification will not be avoided by non-participation of the biased member in the proceedings if he/she was present. The Supreme Court in a case quashed the decision of the Textbook Selection Committee because some of its members were also authors of books which were considered for selection when the decision was reached.

### 6.2.3 Subject Matter Bias

Those cases fall within this category where the deciding officer is directly, or otherwise, involved in the subject matter of the case. Here again mere involvement would not vitiate the administrative action unless there is a real likelihood of bias.

In a case the Supreme Court quashed the decision of the Andhra Pradesh Government, nationalizing road transport on the ground that the Secretary of the Transport Department who gave hearing was interested in the subject-matter.

### 6.2.4 Departmental Bias

The problem of 'departmental bias' is something which is inherent in the administrative process, and if it is not effectively checked, it may negate the very concept of fairness in the administrative proceeding.

The problem of 'departmental bias' also arises in a different context, when the functions of judge and prosecutor are combined in the same department. It is not uncommon to find that the same department which initiates a matter also decides it, therefore, at times departmental fraternity and loyalty militates against the concept of fair hearing.

In a case, the Supreme Court quashed the notification of the Government which had conferred powers of a Deputy Superintendent of Police on the General Manager, Haryana Roadways in matters of inspection of vehicles on the ground of departmental bias. In this case private bus operators had alleged that the General Manager of Haryana Roadways who is a rival in business in the State, cannot be expected to discharge his duties in a fair and reasonable manner he would be too lenient in inspecting the vehicles belonging to his own department.

The reason for quashing the notification according to the Supreme Court was the conflict between the duty and the interest of the department and the consequential erosion of public confidence in administrative justice.

### 6.2.5 Preconceived Notion Bias

'Bias' arising out of preconceived notions is a very delicate problem of administrative law. On the one hand, no judge as human being is expected to sit as a blank sheet of paper, on the other, preconceived notions would vitiate a fair trial.

The problem of bias arising from preconceived notions may have to be disposed of as an inherent limitation of the administrative process It is use less to accuse a public officer of bias merely because he is predisposed in favour of some policy in the public interest. Bias would also not disqualify an officer from taking an action if no other person is competent to act in his place. This limitation is grounded on the doctrine of necessity.

However the term 'bias' must be confined to its proper place If 'bias' arising out of preconceived notions means the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. Therefore, unless the strength of the preconceived notions is such that it has the capacity of foreclosing the mind of the judge, administrative action would not be vitiated.

## INTEXT QUESTIONS 6.2

1. Define the term 'Bias'.
2. Give one example each of the followings:
   (a) 'Pecuniary Bias'
   (b) 'Subject-matter Bias'
   (c) 'Departmental Bias'
3. List the various aspects of 'Bias'.

## 6.3 RULE OF FAIR HEARING

The Rule simply implies that a person must be given an opportunity to defend himself/herself. This principle is a 'sine qua non' of every civilized society. Corollary deduced from this rule is " qui aliquid statuerit, parte inaudita altera aeuquum licet dixerit, haud aequum facerit" (he who shall decide anything without the other side having been heard although he may have said what is right will not have done what is right). The same principle was expressed by

Lord Hewart when he said, " It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seem to be done''. Administrative difficulty in giving notice and hearing to a person cannot provide any justification for depriving the person of opportunity of being heard. Furthermore, observance of the rules of natural justice has no relevance to the fatness of the stake but is essentially related to the demands of a given situation.

Even if the legislature specifically authorizes an administrative action without hearing, except in cases of recognised exceptions, then the law would be violative of the principles of fair hearing as per Articles – 14 and 21 of the Indian Constitution. However, refusal to participate in enquiry without valid reason cannot be pleaded as violation of natural justice at a later stage.

### 6.3.1 Right to Notice

'Notice' is the starting point of any hearing. Unless a person knows the formulation of subjects and issues involved in the case, he/she cannot defend himself/herself. It is not enough that the notice in a case be given, but it must be adequate also. The adequacy of notice is a relative term and must be decided with reference to each case. But generally a notice in order to be adequate must contain the following :

The test of adequacy of 'Notice' will be whether it gives sufficient information and material so as to enable the person concerned to put up an effective defence. Therefore, the contents of notice, persons who are entitled to 'Notice' and the time of giving 'Notice' are important matters to ascertain any violation of the principles of natural justice. Sufficient time should also be given to comply with the requirement of notice. Thus, when only 24 hours were given to demolish a structure alleged in a dilapidated condition, Court held that notice is not proper. In the same manner where notice contained only one charge, the person cannot be punished for any other charge for which notice was not given.

However, the requirement of notice will not be insisted upon as a mere technical formality, when the concerned party clearly knows the case against him and is not thereby prejudiced in any manner in putting up an effective defence.

### 6.3.2 Right to Present Case and Evidence

The adjudicatory authority should afford reasonable opportunity to the party to present his/her case. This can be done through writing or orally at the discretion of the authority unless the statute under which the authority is functioning directs otherwise.

The requirements of natural justice are met only if opportunity to represent is given in view of the proposed action. The demands of natural justice are not

met even if the very person proceeded against has been fur-nished information on which the action is based, if it is furnished in a casual way or for some other purposes. This does not mean that the opportunity need be a "double opportunity", that is, one opportunity on the factual allegations and another on the proposed penalty. But both may be rolled into one.

The Courts are unanimous on the point that oral hearing is not an integral part of fair hearing unless the circumstances are so exceptional that without oral hearing a person cannot put up an effective defence. Therefore, where complex legal and technical questions are involved or where stakes are very high oral hearing shall become a part of fair hearing. Thus, in the absence of a statutory requirement for oral hearing courts will decide the matter taking into consideration the facts and circumstances of every case.

### 6.3.3 The Right to Rebut Adverse Evidence

The right to rebut adverse evidence presupposes that the person has been informed about the evidence against him. This does not, however, necessitate the supply of adverse material in original in all cases. It is sufficient if the summary of the contents of the adverse material in made available provided it is not misleading.

The opportunity to rebut evidence necessarily involves the consideration of two factors: cross-examination and legal representation.

### 6.3.4 Cross-Examination

'Cross-examination' is the most powerful weapon to elicit and establish truth. However, the Courts do not insist on 'cross-examination' in administrative adjudication unless the circumstances are such that in the absence of it the person cannot put up an effective defence. Where the witnesses have orally deposed, the refusal to allow cross-examination would certainly amount to violation of the principles of natural justice. In the area of labour relations and disciplinary proceedings against civil servants also, the right to cross-examination is included in the rule of fair hearing.

### 6.3.5 Legal Representation

Normally representation through a lawyer in any administrative proceeding is not considered an indispensable part of the rule of natural justice as oral hearing is not included in the meaning of fair hearing. This denial of legal representation is justified on the ground that lawyers tend to complicate matters, prolong the proceedings and destroy the essential informality of the proceedings. It is further justified on the ground that the representation through a lawyer of choice would

give edge to the rich over the poor who cannot afford a good lawyer. The fact remains that unless some kind of a legal aid is provided by the agency itself, the denial of legal representation, to use the words of Professor Allen, would be a 'mistaken kindness' to the poor people.

To what extent legal representation would be allowed in administrative proceedings depends on the provisions of the Statute. Factory Laws do not permit legal representation, Industrial Dispute Acts allows it with the per-mission of the Tribunal and some Statutes like Income Tax Act permit legal representation as a matter of right.

However, the Courts in India have held that in situations where the person is illiterate, or the matter is complicated and technical, or expert evidence is on record or a question of law is involved, or the person is facing a trained prosecutor, some professional assistance must be given to the party to make his right to defend himself meaningful.

### 6.3.6 Report of the Inquiry to be shown to the Other Party

In many cases, especially in matters relating to disciplinary proceedings, it happens that to conduct the inquiry, the action is entrusted to someone else and on the basis of the report of the inquiry the action is taken by the competent authority. Under these circumstances a very natural question arises is that whether the copy of the report of the inquiry officer be supplied to the charged employee before final decision is taken by the competent authority?

This question is important both from the constitutional and administrative law point of view. One of the cardinal principles of the administrative law is that any action which has civil consequences for any person cannot be taken without complying with the principles of natural justice. Therefore, administrative law question in disciplinary matter has always been whether failure to supply the copy of the Report of the Inquiry to the delinquent employee before final decision is taken by the competent authority would violate the principles of natural justice?

In the same manner the constitutional question in such a situation will be whether failure to supply the copy of the Report of the Inquiry to the delinquent would violate the provisions of Article – 311(2) of the Constitution of India? Article – 311(2) of the Constitution provides that no government employee can be dismissed or removed or reduced in rank without giving him/her a reasonable opportunity of being heard in respect of charges framed against him/her. Therefore, it has always been a perplexing question whether failure to supply the report of the inquiry officer to the charged government employee before final decision is taken would amount to failure to provide "reasonable opportunity"

as required under Article 311(2) Another Constitutional question that can be asked in such a situation would be whether any final action taken by the authority on the basis of the report of the inquiry without first supplying the copy of it to the delinquent would be arbitrary and hence violative of Article – 14 of the Constitution which enshrines the great harmonizing and rationalizing principle?

The findings on the merit recorded by the Inquiry Officer are intended merely to supply appropriate material for the consideration of the government. Neither the findings nor the recommendations are binding on the Disciplinary Authority.

The Inquiry Report along with the evidence recorded by the inquiry officer constitute the material on which the government has ultimately to act. That is the only purpose of the inquiry and the report which the inquiry officer makes as a result thereof.

The application of the principles of natural justice varies from case to case depending upon the factual aspect of the matter. For example, in the matters relating to major punishment, the requirement is very strict and full-fledged opportunity is envisaged under the statutory rules before a person is dismissed removed or reduced in rank, but where it relates to only minor punishment, a mere explanation submitted by the delinquent officer concerned meets the requirement of principles of natural justice. In some matters oral hearing may be necessary but in others, It may not be necessary.

### 6.3.7 Post Decisional Hearing

'Pre-Decisional Hearing' is the standard norm of rule of audi alteram partem. But 'Post-Decisional Hearing' affords an opportunity to the aggrieved person to be heard. However, 'post-decisional hearing' should be an exception rather than being the rule itself. It is acceptable in the following situations:

1. where the original decision does not cause any prejudice or detriment to the person affected;
2. where there is urgent need for prompt action; and
3. where it is impracticable to afford pre-decisional hearing.

The idea of 'Post-Decisional Hearing' has been developed to maintain a balance between administrative efficiency and fairness to the individual. This harmonizing tool was developed by the Supreme Court in 'Maneka Gandhi v. Union of India'. In this case on 1st June, 1976 the passport of the petitioner, a journalist, was impounded in public interest by an order of the Government without furnishing any reasons therefore. The petitoner, being aggrieved by such artbitary action of the government filed a petition before the Supreme Court under Article-32 challenging

the validity of the impoundment order. One of the contentions of the government was that the rule of audi alterm partem must be held to be excluded because it may frustrate the very purpose of impounding the passport. Rejecting the contention, the court rightly held that though the impoundment of the passport is an administrative action yet the rule of fair hearing is attracted by necessary implication and it would not be fair to exclude the application of this cardinal rule on the ground of administrative convenience. Though the court had not quashed the order outrightly but has developed the technique of 'Post-Decisional Hearing' in order to balance such situations to provide a fair opportunity of being heard immediately after serving the order impounding the passport; which would satisfy the mandate of natural justice.

## INTEXT QUESTION 6.3

1. Define 'Rule of Fair Hearing'.
2. Discuss the main components of a 'Valid Notice'.

## 6.4 REASONED DECISIONS OR SPEAKING ORDERS

The third principle of Natural Justice which has developed in course of time is that the order which is passed affecting the rights of an individual must be a speaking order. This is necessary with a view to exclude the possibility of arbitrariness in the action. A bald order requiring no reason to support it may be passed in an arbitrary and irresponsible manner. It is a step in furtherance of achieving the end where society is governed by Rule of Law.

The other aspect of the matter is that the party, against whom an order is passed, in fair play, must know the reasons of passing such order. It has a right to know the reasons. The orders against which appeals are provided must be speaking orders. Otherwise, the aggrieved party will not be in a position to demonstrate before the appellate authority as to in which manner, the order passed by the initial authorities is bad or suffers from illegality. To a very great extent, in such matters bald orders render the remedy of appeal nugatory. However, it is true that administrative authorities or Tribunals are not supposed to pass detailed orders as passed by the courts of law. They may not be very detailed and lengthy orders but they must at least show that the mind was applied and for the reasons, howsoever briefly they may be stated, the order by which a party aggrieved is passed. There cannot be any prescribed form in which the order may be passed but the minimum requirement as indicated above has to be complied with. The Supreme Court has many times taken the view that non-speaking order amounts to depriving a party of a right of appeal. It has also been held in some of the

decisions that the appellate authority, while reversing the order must assign reasons for reversal of the findings.

## INTEXT QUESTION 6.4

1. Explain the meaning of 'Reasoned Decisions' or 'Speaking order'.
2. What do you understand by the term, 'Speaking Order'. Point out the significance of 'Speaking Order' in administrative proceedings.

## 6.5 EXCEPTIONS TO THE RULE OF NATURAL JUSTICE

Application of the Principles of Natural Justice can be excluded either expressly or by necessary implication subject to the provisions of Articles 14 and 21 of the Constitution. Therefore, if the Statute, expressly or by necessary implication, precludes the rules of natural justice it will not suffer invalidation on the ground of arbitrariness.

### 6.5.1 Exclusion in Emergency

In exceptional cases of emergency where prompt preventive or remedial action, is needed, the requirement of notice and hearing may be obviated. Such as, in situations where a dangerous building is to be demolished, or a company has to be wound up to save depositors.

However, the administrative determination of an emergency situation calling for the exclusion of rules of natural justice is not final. The courts may review the determination of such a situation.

Natural Justice is pragmatically flexible and is amenable to capsulation under compulsive pressure of circumstances. It is in this context that the Supreme Court observed: "Natural Justice must be confined within their proper limits and must not be allowed to run wild. The concept of Natural Justice is a magnificent thoroughbred on which this Nation gallops forward towards its proclaimed and destined goal of justice social, economic and political.

### 6.5.2 Exclusion in Cases of Confidentiality

In a case the Supreme Court held that the maintenance of surveillance register by the police is a confidential document. Neither the person whose name is entered in the register nor any other member of the public can have access to it. Furthermore, the court observed that the observance of the principles of

natural justice in such situation may defeat the very purpose of surveillance and there is every possibility of the ends of justice being defeated instead of being served. Same principle was followed in S.P. Gupta v. Union of India where the Supreme Court held that no opportunity of being heard can be given to an Additional Judge of a High Court before his name is dropped from being confirmed. It may be pointed out that in a country like India surveillance may provide a very serious constraint on the liberty of the people, therefore, the maintenance of the surveillance register cannot be so utterly administrative and non-judicial that it is difficult to conceive the application of the rules of natural justice.

### 6.5.3 Exclusion in case of routine matters

A student of the university was removed from the rolls for unsatisfactory academic performance without giving any pre-decisional hearing. The Su-preme Court held that the very nature of academic adjudication appears to negative any right of an opportunity to be heard. Therefore if the competent academic authorities examine and assess the work of a student over a period of time and declare his work unsatisfactory, the rules of natural justice may be excluded. In the same manner when the Commission cancelled the examination of the candidate because, in violation of rules, the candidate wrote his roll number on every page of the answer, the Supreme Court held that the principles of natural justice are not attracted. Court observed that the rule of hearing is strictly construed in academic discipline as if this is ignored it will not only be against public interest but would also erode social sense of fairness. However, this exclusion shall not apply in case of disciplinary matters or where the academic body permits non-academic circumstances.

### 6.5.4 Exclusion Based on Impracticability

Rules of Natual Justice may be exluded on the grounds of administrative impracticability. For example in a case where the entire M.B.A. entrance examination was cancelled by the university because of mass copying, the court held that notice and hearing to all the candidates is not possible in this situation, which has assumed national proportions. Thus the court sanctified the exclusion of the rules of natural justice on the ground of administrative impracticability.

### 6.5.5 Exclusion in Cases of Interim Preventive Action

If the action of the administrative authority is a suspension order in the nature of a preventive action and not a final order, the application of the principles of natural justice may be excluded. In a case where the institution passed an

order debarring the student from entering the premises of the institution and from attending classes till the pendency of a criminal case against him for stabbing a co-student. The Delhi High Court held that such an order could be compared with an order of suspension pending enquiry which is preventive in nature in order to maintain campus peace and hence the principles of natural justice shall not apply. Therefore, natural justice may be excluded if its effect would be to stultify the action sought to be taken or would defeat and paralyse the administration of the law. The Supreme Court in Maneka Gandhi v. Union of India observed : "Where an obligation to give notice and opportunity to be heard would obstruct the taking of prompt action, especially action of a preventive or remedial nature, right of prior notice and opportunity to be heard may be excluded by implication."

### 6.5.6 Exclusion in Cases of Legislative Actions

Legislative action, may be plenary or subordinate, is not subjected to the rules of natural justice because these rules lay down a policy without reference to a particular individual. On the same logic principles of natural justice can also be excluded by a provision of the Constitution also. Constitution of India excludes the principles of natural justice in Articles 22, 31(A), (B), (C) and 311(2) as a matter of policy. Nevertheless if the legislative action is arbitrary, unreasonable and unfair, courts may quash such a provision under Articles 14 and 21 of the Constitution. In a case the Supreme Court held that no principles of natural justice have been violated when the government issued notification fixing the prices of certain drugs. The Court reasoned that since notification flowed from a legislative act and not an administrative one so the principles of natural justice do not apply.

### 6.5.7 Where No Right of the Person is Infringed

Where no right has been conferred on a person by any statute nor any such right arises from common law, the principles of natural justice are not applicable. This can be illustrated by referring a decision of the Supreme Court The Delhi Rent Control Act makes provision for the creation of limited tenancies. Sections 21 and 37 of the Act provide for the termination of limited tenancies. Combined effect of these sections is that after the expiry of the term a limited tenancy can be terminated. The Supreme Court held that after the expiry of the prescribed period of any limited tenancy, a person has no right to stay in possession and hence no right of his is prejudicially affected which may warrant the application of the principles of natural justice.

### 6.5.8 Exclusion in Case of Statutory Exception or Necessity

Disqualification on the ground of bias against a person will not be applicable if he is the only person competent or authorized to decide that matter or take that action. If this exception is not allowed there would be no other means for deciding that matter and the whole administration would come to a grinding halt. But the necessity must be genuine and real. Therefore, the doctrine of necessity cannot be invoked where the members of the Text Book Selection Committee were themselves the authors because the constitution of the selection committee could have been changed very easily by the government.

### 6.5.9 Exclusion in Case of Contractual Arrangement

In a case the Supreme Court held the principles of natural justice are not attracted in case of termination of an arrangement in any contractual field. Termination of an arrangement/agreement is neither a quasi-judicial or an administrative act so that the duty to act judicially is not attracted.

## INTEXT QUESTION 6.5

1. Name some of the 'Exceptions' to the Principles of Natural Justice.

**Write True/False**

2. Application of principles of Natural Justice can be excluded either expressly or by necessary implications subject to the provisions of Articles–14 and 21 of the Constitution. (True/False)
3. Natural Justice is pragmatically flexible and amenable to capsulation under compulsive pressure of circumstances. (True/False)

## WHAT YOU HAVE LEARNT

- Natural Justice represents higher procedural principles developed by judges which every administrative agency must follow in taking any decision adversely affecting the rights of a private individual. The principles of natural justice are firmly grounded under various Artciles of the Constitution. There are mainly two principles of Natural Justice.

    1. 'Rule against Bias' which signifies that the judge must be impartial and must decide the case objectively on the basis of the evidence on record. There are various factors which may influence the judgement. These include personal bias, pecuniary bias, subject matter bias, departmental bias and preconceived notion bias.

2. 'Rule of Fair Hearing' which means that a person must be given an opportunity to defend himself. The important components of this rule are right to notice, right to present case and evidence, the right to rebut adverse evidence, cross- examination, legal representation, report of the enquiry to be shown to the other party and post decisional hearing.

- Similarly the Natural Justice demands that every decision should mention the reasons for arriving at such decision.
- There are a number of Exceptions to the Principles of Natural Justice. These are exclusion in emergency, confidentiality, routine matters, exclusion based on impracticability, interim preventive action, legislative action, where no right of the person is infringed, statutory exception or necessity, contractual arrangement.

## TERMINAL QUESTIONS

1. Explain the 'Rule Against Bias'. Discuss various types of 'bias' which may operate in the decision making by the administrative authorities.
2. Examine the Rule of Fair Hearing. Critically analyse the various aspects of this Rule.
3. Define the term 'Speaking Order'.
4. Identify the various 'Exceptions' to the Rule of Natural Justice.

## ANSWERS TO INTEXT QUESTIONS

### 6.1

1. Natural Justice implies fairness, reasonableness, equity and equality.
2. Article 14 and 21 of the Constitution provide the strong basis of the principles of Natural Justice. Article – 14 bars arbitrary actions whereas Article – 21 provides for substantive and procedural fairness in matters which effect the life and liberty of individuals.
3. Two main principles of Natural Justice are (i) No one should be the Judge in his/her own case and (ii) each party should be given the opportunity to be heard.

### 6.2

1. The term 'Bias' means an operative prejudice whether conscious or unconscious in relation to a party or issue.

2. Three examples are:
   (a) The adjudicating officer has shares in one of the companies.
   (b) A person who is the member of the selection panel is also one of the applicants for the post.
   (c) An officer of the government Transport company authorised to inspect the government and private vehicle.
3. Various aspects of 'Bias' are:
   (a) Personal Bias
   (b) Pecuniary Bias
   (c) Subject Matter Bias
   (d) Pre-conceived Notion bias and
   (e) Departmental Bias

## 6.3

1. 'Rule of Fair Hearing' simply implies that a person must be given an opportunity to defend himself/herself.
2. The important components of a Notice are:
   1. Time, place and nature of hearing.
   2. Legal authority under which hearing is to be held.
   3. Statement of specific charges which the person has to meet.

## 6.4

1. The term 'Reasonal Decisions' or 'Speaking orders' means tht the order which is passed affecting the rights of an individual must be speaking order. The party against whom an order is passed in fair play, must know the reasons of passing the order.
2. 'Speaking order' is the order which mentions the reason (s) for arriving at a particular decision. It helps in avoiding arbitrariness. It helps in building up the trust and confidence in the system. It provides the ground (s) of appeal if desired by the aggrieved party.

## 6.5

1. Some of the important exceptions to the principles of natural justice are – exclusion in emergency, confidentiality, routine matters, exclusion legislative action, where no right of the person is infringed etc exclusion in case of statutory exception or necessity, exclusion in case of contractual arrangement.
2. True
3. True

Notes

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7

# TECHNIQUES OF LAW AND REMEDIES I

In this world there has always been a competition between law-makers and violators of law. This is because of increase in intellect level and improvement in technology coupled with deep rooted corruption that is prevalent in every walk of life. Thus, there is puzzle among law-makers and its keys to solve are broadly divided into two parts viz. Criminal Procedure Code (Cr. P. C) and Civil Procedure Code (C. P. C.). Now, the problem before the law-makers is how to punish the offenders! From time to time various well known jurists and law researchers have come up with their philosophy with regard to punishment which are categorised under the techniques of law under Criminal Procedure Code and Civil Procedure Code. These techniques have been developed as a result of analysis and practiced punishments given for various crimes across the globe. The Techniques of law and remedies are based on the famous dictum, ***"for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately"***.

## OBJECTIVES

After studying this lesson you will be able to:

- understand what is Criminal Law;
- know what is Civil Law;
- identify the various types of punishments;
- explain the meaning of 'Pleading' and its principles;
- understand the meaning and Principles of Drafting;
- explain the various remedial measures available under Civil Law;

- know the various remedial measures available under Criminal Law;
- describe 'Writs' and its types; and
- explain Public Interest Litigation (PIL).

## 7.1 TYPES TECHNIQUES/THEORIES OF PUNISHMENTS

The types of punishments are based on the various theories of punishments. These are as follows:

- **Deterrent Theory:** A punishment is primarily deterrent when its object is to show the futility of crime and thereby teach a lesson to others. The philosophy behind this theory and type of punishment is to give a clear message that ***"a crime is an ill bargain to the offender"***. Thus, followers of this theory advocates capital punishments to the offenders.
- **Preventive Theory:** This Theory aims to disable the wrong-doer and creating a fear of punishment in the mind of the wrong doer. This Theory works in the following three ways:
  - By inspiring all perspective wrong doers with the fear of punishment;
  - By disabling the wrong doer from immediately committing any crime; and
  - By transforming the offender by a process of reformation and re–education, so that he/she would not commit crime again.

  Some of the punishments advocated by the followers of this philosophy are imprisonment, fines etc.
- **Reformative Theory:** According to this Theory a 'crime' is committed as a result of the conflict between the character and the motive of the criminal. This Theory aims at strengthening the character of the wrong doer, so that he/she does becomes an easy victim to its own temptations and curing the mental state of the wrong-doer. Thus, this Theory works on the dictums, **"you cannot cure by killing"** and **"Crime is like a disease"**. This theory also uses rehabilitative techniques to reform the wrong-doers. These techniques are used to motivate the wrong-doers by opening the doors of employment and self-employment for them. This way wrong-doers start earning that uplifts their economic status, which in return takes off the motive of committing crime.

  Some of the punishments advocated by the followers of this philosophy are – jail, probation, reformatory homes, vocational training etc.

  A very important point is to be borne in mind regarding the concepts imprisonment and jail. Usually these two terms are used interchangeably, as these are treated synonyms. Yet there is difference between these two terms, which is as follows:

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Jail is a place where a wrong doer spends short term sentences, while in imprisonment the there is long term sentences. Jail has fewer amenities in comparison to prison. In jail offenders get only food, stay and security whereas in prison offenders get much more amenities.

- **Retributive Theory:** according to this Theory any rational system of administration of justice must attempt to satisfy this emotion of retributive indigenous. This kind of punishment will not only satisfy the primitive spirit of private vengeance in the wronged, but also quench a similar feeling in the society at large. This Theory is based on the idea of vindictive justice, or a tooth for a tooth and an eye for an eye. The principle is that if a man/woman has caused the loss of a man's/women's eye, his/her eye one shall cause to be lost; if he/she has shattered a man's limb, one shall shatter his/her limb; if a man/woman has made the tooth of a man/woman that is his/her equal fall out, one shall make his/her tooth fall out. ***Kant's retributive theory of punishment, punishment is not justified by any good results, but simply by the criminal's guilt. Criminals must pay for their crimes; otherwise an injustice has occurred. Furthermore, the punishment must fit the crime. Kant asserts that the only punishment that is appropriate for the crime of murder is the death of the murderer. As he puts it, "Whoever has committed a murder must die."***
- **Compensation Theory:** According to this Theory the object of punishment must not be merely to prevent further crimes but also compensate the victim of the crime. This Theory further believes that the main spring of criminality is greed and if the offender is made to return the ill gotten benefits of the crime, the spring of criminality would be dried up.

## INTEXT QUESTIONS 7.1

1. List the various theories of punishment.
2. What is advocated by Compensation Theory?
3. Is 'punishment' necessary?

## 7.2 PLEADING AND PRINCIPLES OF PLEADING

According to Halsbury's Law of England, A 'pleading' is used in civil cases to denote a document in which a party to a proceeding in a court of first instance is required by law to formulate in writing his/her case or part of his/her case in preparation for the hearing.

According to P. C. Mogha, 'Pleadings' are the statements in writing drawn up and filed by each party to a case stating what his/her contentions will be at the trial and giving all such details as his/her opponent needs to know in order to prepare his/her case in answer.

## Principles of Pleadings

According to Order VI Rule 2 of CPC the Principles of Pleading are as follows:

- **Every 'pleading' must state the facts and not the law:** An analysis of this rule shows that it has two parts, one is affirmative and the other one is negative. The former part of the rule directs that a pleading must state facts while the later part of the rule directs that a pleading must not state the law. The implication is that the following things should not be stated in the pleading:

  a. Provisions of law

  b. Conclusions of law

  c. Conclusions of mixed law and facts

  It is for the obvious reason that the courts are bound to take judicial notice of the law applicable to the facts pleaded by the parties. Thus, if in a particular case the court finds 'suo motu' that the rules under which the D.I.G Police proceeded to dismiss the plaintiff were 'ultra vires' and so in-operative, it is its duty to declare that the order of dismissal was illegal.

  Exceptions to the above rule are as follows:

  I. Foreign law: a court is not bound to take judicial notice of foreign laws.

  II. Customs

  III. Mixed questions of law and facts

  IV. Legal pleas

  V. Inferences of law

- **Every pleading must state all the material facts only:** There are following three aspects of this principle

  a. Every 'pleading' must state material facts only: To overcome the problem of overburdening of facts in a pleading the second rule says only material facts to be mentioned. The answer given by the code is that material facts are those facts which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defense.

  b. Every 'pleading' must state all the material facts: The Supreme Court has laid down in SN Balkrishan Vs. George Fernandez AIR 1969 that the omission of single material fact leads to an incomplete cause of action and the statement of claim becomes bad. Thus, any omission of material fact(s) amounts to no cause of action at all.

  c. Every 'pleading' must state only those material facts which are material at the present stage of the action: thus, without reference to

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the possible objections of the opposite party it is not necessary to anticipate the answer of the adversary.

Exceptions to the second rule are as follows:

i. **Condition Precedent:** there is no need for a party to state in his/her pleading the performance of any condition precedent for its averment shall be implied in his pleading. For example, X agrees to build a house for Y at certain rates subject to condition of the contract is that payment should only be made upon the certificate of Y's architect that so much amount of work is due. If X desires to file a suit for money against Y, the obtaining and presenting of the certificate from Y's architect is condition precedent to X's right of action. Here it is not necessary of Y to state in his plaint that he has obtained the said certificate. He can simply draft a plaint showing a good prima facie right to the agreed amount without mentioning any certificate. It will be for Y to plead that the architect has never certified that amount of money is due.

ii. **Presumption of Law:** Order VI, Rule 13 of CPC provides that neither party need in any pleading allege any matter of fact which the law presumes in his/her favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied. Example, consideration of bill of exchange where the plaintiff has only on the bill and not for the consideration as substantive ground of claim.

iii. **Matters of Inducement:** It is sometime desirable to commence a plaint with some introductory averments stating who are the parties, what business they carry on, how they are related or connected and other surrounding circumstances leading up to the dispute. Such facts are not essential to the cause of action and therefore, not material. These are called matters of inducement and are allowed in England and the same may be tolerated in our country also on the same basis.

- Every 'pleading' must state the facts on which the party pleading relies and not the evidence by which they are to be proved: this rule directs that every pleading shall contain a statement of the material facts on which the party pleading relies for his/her claim or defence but not the evidence by which they are to be proved. A party need not set out the evidence whereby he/she proposes to prove the facts relied upon him/her. It is absolutely essential that the 'pleading', not to be embarrassing to the opposite party, should state those facts which will put him/her on his/her guard and tell him/her what he/she will have to meet when the case comes on for trial.

**Practical or special application of the rule:**

- **Mental Condition:** Order VI, Rule 10 directs that whenever it is material to allege malice, fraudulent, intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.
- **Notices:** Order VI, Rule 11 lays down that whenever it is material to allege notice to any person of any fact, matter or thing. It shall be sufficient to allege such notice as a fact unless the form or the precise terms of such notice or the circumstances from which such notice is to be inferred are material.
- **Implied Contract or Relative:** Order VI, Rule 12 directs that whenever any contract or any relation between any person is to be implied from a series of letters or conversation or otherwise from a number of circumstances. It shall be sufficient to allege such contract or relation of fact and to refer generally to such letters, conversation or circumstances without setting them out in detail and in such a case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he/she may state the same in the alternative.

  **Exception:** the only exception to the third rule is in the case of writ petitions and election petitions. In such petitions it is necessary to state matters of evidences in support of the allegations made therein.
- Every 'pleading' must state the material facts concisely but with precision and certainty: this rule highlights two requisites for a good pleading, (a) Conciseness and (b) Preciseness and Certainty. As pointed out by Pal, J., of the Calcutta High Court, the 'pleading' not only needs to be concise they must also be precise. Thus, to make a plaint concise we must follow three things: (a) omit unnecessary allegations (b) omit all unnecessary details when alleging material facts and (c) give proper attention to the language used in alleging material fact.

## INTEXT QUESTIONS 7.2

1. Explain the term 'Pleading'.
2. List any two Principles of Pleading.

## 7.3 DRAFTING AND PRINCIPLE OF DRAFTING

'Drafting' is a combination of law and the facts of law in a language form. In law drafting refers to preparing of a legal document for legal purpose(s). Thus, the language used in the drafting is legal language that is understood by a person who has legal knowledge. 'Drafting' is a very articulated work, where the drafter

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has to choose the right word as well as the right concept i.e. right law and the right fact to law.

## Principle of Drafting

To draft a good legal document it is explained under two broad heads: (a) Planning and (b) Writing.

- **Planning for Good Draft:** the planning to write a good legal document there are three important aspects to it are:
  - **Objective:** What does it have to do? In legal terms, what must the thing you are drafting (ie, Bill, Part, section) achieve?
  - **Framework:** Work out the overall conceptual structure: group material into Parts, subparts, and sections, etc.
  - **Order:** Organisation of material is a key to a well-structured Bill or regulation. Material should be arranged in a logical order.
- **Writing a Good Draft:** to write a good legal document there are five important aspects to it are:
  - **Headings:** Summarise if possible, otherwise indicate specic topic, Keep brief,
    Draft with an eye to use in contents, Use liberally.
  - **Sections:** One coherent group of ideas per section, Use the narrative style—avoid excessive cross-references, Preferably no more than 5 subsections,
    Avoid going down to subparagraphs.
  - **Sentences:** Get to the main point (from the reader's point of view) early, Keep sentences short and simple— focus on verbs, avoid nominalisations, avoid passive constructions unless they are necessary to convey the desired meaning,
    keep the subject and predicate close, punctuate effectively. Write in active voice: such sentences eliminate the chances of confusion. Use active verbs: like,
    1. **Do not use** Give consideration to **use** consider
    2. **Do not use** is applicable to **use** applies to
    3. **Do not use** make payment **use** pay
    4. **Do not use** give recognition to **use** recognise
    5. **Do not use** is concerned with **use** concerns
  - **Words:** Use the simplest word that conveys the meaning, eliminate unnecessary words, do not use archaic language, and always use

gender-neutral language. Deûne terms in a way that is truthful and helpful to the reader.

- **General:** Be consistent; Use a positive statement unless a negative one is better.

## INTEXT QUESTIONS 7.3

1. Explain the term 'Drafting'.
2. List the two broad heads for drafting a good legal document.

## 7.4 REMEDIAL MEASURES

This Section will explain various remedial measures available in the Civil as well as in Criminal cases.

Remedies are of 4 types (a) damages (b) restitution (c) coercive (d) declaratory.

### Remedies: Civil Law

In the civil matters the remedies are mostly of monetary in nature. These matters have remedies of compensation of the actual loss, pain and sufferings and legal costs. The various types of remedial measures are as follows:

- **Compensation:** It is a remedy provided to the victim for the actual loss, pain and suffering being undergone. The law penalizes the wrong-doer by awarding the compensation to the victim to compensate for the loss and pain and suffering.
- **Specific Relief:** 'Specific Relief' is contained in the Specific Relief Act I of 1877, before the passing of the Specific Relief Act the law as to Specific Relief was contained in Sections 15 and 192 of the Civil Procedure Code (Act VIII) of 1859. The 'relief' is called specific because it is relief in specie i.e. in terms of the very thing to which a suitor is entitled. It is a remedy where law allows to a person whose right has been invaded. The forms of 'Specific Relief' are of – (a) taking possession of property and delivering it to the claimant who is out of possession, (b) requiring performance of contract, (c) compelling the performance of statutory duty and (d) preventing the doing of wrong. Thus, 'Specific Relief' to be granted only for enforcing individual civil rights and not for enforcing penal laws.

  The Civil Law is both facilitating and enabling as the stringent laws are facilitating victims to organised as well as at the same time it is enabling them to raise their voices and contest a case in court of law to seek justice.

### Remedies: Criminal Law

In the criminal matters the remedies are ofently known as sentences. These matters have remedies of compensation of the actual loss, pain and sufferings and legal costs. The various types of remedial measures are as follows:

- **Compensation:** it is a remedy provided to the victim for the actual loss, pain and suffering being undergone. The law penalizes the wrongdoer by awarding the compensation to the victim to compensate for the loss and pain and suffering. Many a times it has been observed by the Hon'ble courts that only money compensation is not enough so in such case(s) the punitive damages are given as a sentence! Under punitive damage sentence the court may order fine plus imprisonment. For example, in case of violation of rule of Indian Railways the court may pass a sentence of punitive damage in nature as per the nature of offence.
- **Specific Relief:** specific relief is contained in the Specific Relief Act I of 1877, before the passing of the Specific Relief Act the law as to Specific Relief was contained in Sections 15 and 192 of the Civil Procedure Code (Act VIII) of 1859. The relief is called specific because it is relief in specie i.e. in terms of the very thing to which a suitor is entitled. It is a remedy where law allows to a person whose right has been invaded. The forms of 'Specific Relief' are of – (a) taking possession of property and delivering it to the claimant who is out of possession, (b) requiring performance of contract, (c) compelling the performance of statutory duty and (d) preventing the doing of wrong. Thus, 'Specific Relief' to be granted only for enforcing individual civil rights and not for enforcing penal laws.
- The Criminal Law is both facilitating and enabling as the stringent laws are facilitating victims to organised as well as at the same time it is enabling them to raise their voices and contest a case in court of law to seek justice.

## INTEXT QUESTIONS 7.4

1. Explain the 'remedies' available in civil matters.
2. Define; the terms (a) Compensation (b) Specific Relief.

## 7.5 WRITS

As per the **Right to Constitutional Remedies-Articles 32-35,** A citizen has a right to move to the courts for securing the fundamental rights and legal rights. Citizens can go to the Supreme Court or the High Courts for getting their fundamental rights and legal rights enforced. Any citizen can file a writ petition

in the Supreme Court of India (as provided by article 32 of the Constitution) if it is the nature of violation of fundamental rights, whereas any person can file a Writ Petition in the High Court (as provided by Article 226 of the Constitution) if it is a violation of not only fundamental rights but also where legal, rights have been infringed. Thus, the scope of High Courts is more than the Supreme Court of India as High Courts are also empowered to entertain the Writ Petitions of legal rights as well. The types of Writs are as follows:

1. **Habeas Corpus** means "to have the body". It is in the nature of an order calling upon a person who has unlawfully detained another person to produce the latter before the court. Thus, where "A" has been unlawfully detained by a person "B". A Writ of Habeas Corpus in nature can be filed under article 226 in the High Court. For example cases of kidnapping are also of nature of unlawful detention of a person.
2. **Mandamus** literally means "Command". It is thus an order of a superior court commanding a person holding a public office or a public authority-(including the Government) to do or not to do something, in the nature of public duty. Thus, where a police officer not filing FIR of a victim can be directed by the superior court to file a FIR and take suitable action on the complaint so lodged.
3. **Prohibition -** A Writ of Prohibition is issued by a superior court to an inferior court or tribunal to prevent it from exceeding its jurisdiction and to compel it to keep within the limits of its jurisdiction. Thus, where an inferior court gives an award on a case on which it cannot hold a trail because it is outside the jurisdiction of that court, a superior court may direct the inferior court to forward the case to the right court or the superior court on the writ petition being filed of the nature of prohibition.
4. **Certiorari -** A Writ of Certiorari has much in common with a Writ of Prohibition. The only difference between the two is, whereas a writ of prohibition is issued to prevent an inferior court or tribunal to go ahead with the trial of a case in which it has assumed excess of jurisdiction, a writ of certiorari is issued to quash the order passed by an inferior court or tribunal in excess of jurisdiction.
5. **Quo Warranto -** The words quo warranto means "what is your authority"? A writ of Quo Warranto is issued against the holder of a public office to show to the court under what authority he holds the office. Thus, where a person claims to be customs commissioner can be asked by the court to show up his/her authority for the office being so claimed, under the writ petition being filed of nature of Quo Warranto.

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## INTEXT QUESTIONS 7.5

1. List the five types of 'Writs'.
2. Define Write of 'Habeas Corpus'

## 7.6 PUBLIC INTEREST LITIGATION (PIL)

The concept of **Public Interest Litigation** (PIL) is in consonance with the objects enshrined in Article 39A of the Constitution of India to protect and deliver prompt social justice with the help of law before the 1980s, only the aggrieved party could approach the courts for justice. Thus, anyone not necessarily the victim may approach court of law to protect the public interest at large. The officer(s) of court or court itself may take up any matter suo moto in order to protect the public interest at large. An obvious question that comes in our mind is that "what is public interest?" The answer to this question is 'any act for the benefit of public is public interest.' and those act(s) are such as pollution, terrorism, road safety, constructional hazards, chemical hazards etc. In all these activities we can clearly see that the public interest at large is involved. The very well known cases being filed under this clause are like, PIL against various sport federations after the commonwealth games scam and issues, 'Shubhash Kumar V State of Bihar'. In this case there was a person, who was fired by the Director of the Company so he filed a PIL that this company is acting something wrong so this should be tried. 'Sheela Barse v. State of Maharashtra'. In this case, on receiving a letter from the petitioner, a journalist, the Supreme Court took notice of the complaint of custodial violence to women prisoners in the lock-up in the city of Bombay.

## INTEXT QUESTIONS 7.6

1. Define the concept of Public Interest Litigation (PIL).
2. List some activities of Public Interest Litigation (PIL)

## WHAT YOU HAVE LEARNT

- The types of punishments are based on the various theories of punishment. These are – Deterrent Theory, Preventive Theory, Reformative Theory, Retributive Theory and the Compensation Theory.
- A 'Pleading' is used is civil cases to denote a document in which a party to a proceeding in a court of first instance is required by Law to formulate in writing his/her case or part of his/ her case in preparation for hearing.

- 'Pleadings' are the statements in writing drawn up and filled by each party to a case stating what his/her contentions will be at the trial and giving all such details as his/her opponent needs to know in order to prepare his/her case us answer.
- The main principles of 'Pleadings' are (i) every pleading must state the facts and not the law; (ii) every pleading must state all the material facts and material facts only; (iii) there is no need for a party to state in his/her pleading the performance of any 'condition precedent'; presumption of law, and matters of Inducement:
- 'Drafting' is Combination of Law and the facts of the Law is a language form. To draft a good legal document there are two broad Heads e.g. (i) Planning for good Draft and (ii) Writing a good Draft.
- There are various 'Remedial Measures' available in the Civil as well as in Criminal cases. These are – Compensation, Specific Relief etc.
- There are five Types of Writs.

  These are – Horbeas Corpus, Mandamus, Prohibition, Certiorari and Quo-Warranto. A citizen has a right to move the Courts for securing the fundamental rights and legal rights enforced by filling a Writ Petition.

  The Concept of Public Interest Litigation (PIL) is in consonance with the objects enshrined in Article 39-A of the Constitution of India to protect and deliver promt Social Justice with the help of Law. Anyone, not necessarily the victim may approach the courts of law to protect the public interest at large or the court may take up any matter 'suo-moto' in order to protect the public interest at large.

## TERMINAL QUESTIONS

1. Explain briefly the various remedial measures of Civil Law.
2. Identify the remedies available to the victim under Civil Law.
3. What are the remedies available to the victim under Criminal Law?
4. What is the difference between Civil Remedies and Criminal Remedies?
5. Explain the Reformative Technique of punishment.
6. What is the difference between Deterrent Technique and Retributive Technique of punishment?
7. Explain are the principles laid down for a 'good pleading'.
8. Discuss the various principles to be borne in mind while drafting a 'pleading'.

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9. How is 'Drafting' different from 'Pleading'?
10. How many types of Writ are there?
11. What is the full form of PIL?
12. What is the difference between Writ of 'Habeas Corpus' and 'Quo Warranto'?
13. Explain briefly the various Techniques of Punishments.

## ANSWERS TO INTEXT QUESTIONS

### 7.1

1. There are Five different Theories of punishment being used in law to punish the wrong-doers. These are as follows:
   a. Deterrent theory
   b. Preventive theory
   c. Reformative theory
   d. Retributive theory
   e. Compensatory theory
2. **Compensation Theory** states that, "the object of punishment must not be merely to prevent further crimes but also compensate the victim of the crime. This theory further believes that the main spring of criminality is greed and if the offender is made to return the ill gotten benefits of the crime, the spring of criminality would be dried up."
3. Yes, 'Punishment' is necessary for the wrong-doer. The punishment makes the offence less lucrative or a bad deal. This kills the thrill of committing of an offence. Though the degree of punishment varies from crime to crime. For example, in case of rarest of rare cases which are heinous in nature and performance of the act are awarded death penalty to the wrongdoer. Further, the punishments are also necessary because if there is no punishment to the offence then the wrong-doer will be motivated to commit more crimes and it is also possible that the wrong-doer starts committing more heinous crimes as he/she knows that there is no punishment for the crime.

### 7.2

1. According to P. C. Mogha, 'Pleadings' are the statements in writing drawn up and filed by each party to a case stating what his/her contentions will

be at the trial and giving all such details as his/her opponent needs to know in order to prepare his/her case in answer. Thus, 'pleading' means, a written statement by the victim to tell his/her contentions will be at the trial and giving all such details as his/her opponent needs to know and accordingly the wrong-doer also prepares his/her side of the answer in defense.

2. (i) Every 'Pleading' must state the facts and not the Law.

   (ii) Every 'Pleading' must state all the material facts and material facts only.

## 7.3

1. 'Drafting' is a combination of law and the facts of law in a language form. In law, 'drafting' means preparing a legal document for legal purposes. Thus, the language used in the drafting is legal language that is understood by a person who has legal knowledge. Drafting is a very articulated work, where the drafter has to choose the right word as well as the right concept i.e. right law and the right fact to law. Therefore, drafting is a technique of writing a legal documents on which many a times the success of the case depends.
2. The two brand Heads for Drafting a good legal document are: (a) Planning (b) Writing.

## 7.4

1. (a) Compensation

   (b) Specific Relief

2. (a) 'Compensation' is a remedy provided to the viction for actual loss, pain and suffering being undergone.

   (b) The 'Specific Relief' is a remedy provided to the victim under the Specific Relief Act, 1877. It is a remedy where law allows specific relief to a person whose right has been invaded. The relief is called 'Specific' because it is a relief in terms of the very thing to which a 'suitor' is entitled.

## 7.5

1. There are Five Types of 'writs'. There are :

   (i) Habeas Corpus

   (ii) Mandamus

   (iii) Prohibition

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(iv) Certiorari

(v) Quo Warranto

2. 'Habeas Corpus' means "to have the body". It is the nature of an order of a Superior Court calling upon a person who has unlawfully detained another person to produce the latter before the Court.

## 7.6

1. The concept of Public Interest Litigation (PIL) is in consonance with the objects enshrined in Article 39-A of the Constitution of India to protect and deliver prompt social justice with the help of law. Any person or the 'victim' may approach the court of Law to protect the public interest at large. Court may also force 'svo moto' notice in order to protect the public interest at large.

2. (a) Pollution;

(b) Road Safety'

(c) Chemical hazards'

(d) Constructional hazards; and

(e) Terrorism

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# TECHNIQUES OF LAW AND REMEDIES II

Criminal Law is based on the principles of 'Actus Reus' and 'Mens Rea'. In the previous lesson we have already studied the various purposes of punishment, like, Retribution Aims – equal harm to offender in society's name; Incapacitation Aims – get them out of society; Rehabilitation Aims – treat offenders to help them to re-enter society; Deterrence: (a) General Deterrence Aims – Everyone must see consequences of crime (b) Specific Deterrence Aims – Criminal must see consequences of crime and lastly, Public Education Aims – let society know what our shared values are.

This lesson will also introduce the emerging techniques of Law which is widely used by Indian citizens to prevent corruption and malad ministration. The Government of India enacted Right to information (RTI), Act, 2005 to provide information to the citizens. This Act contains six chapters, Thirty-one sections and two schedules.

## OBJECTIVES

After studying this lesson, you will be able to:

- describe the general or the basic principles of Criminal Law;
- know the general 'defences' as described in the Indian Penal Code (IPC);
- explain the main provisions of Right to Informatioin Act, 2005 (as amended upto Feb 2011); and
- understnad the process of getting the information by the citizens.

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## 8.1 CRIMINAL LAW – CRIME AND GENERAL PRINCIPLES OF CRIMINAL LAW

### Crime

What is 'crime'? This question must be addressed before we move on to Criminal Law. A 'crime' may, therefore, be an act of disobedience to such a law forbidding or commanding it. But then disobedience of all laws may not be a crime, for instance, disobedience of civil laws or laws of inheritance or contracts. Therefore, a 'crime' would mean something more than a mere disobedience to a law, "it means an act which is both forbidden by law and revolting to the moral sentiments of the society." Thus, robbery or murder would be a 'crime', because they are revolting to the moral sentiments of the society, but a disobedience of the revenue laws or the laws of contract would not constitute a crime. Then again, "the moral sentiments of a society" is a flexible term, because they may change, and they do change from time to time with the growth of the public opinion and the social necessities of the times. Thus, Criminal Law focuses on the following equation:

### Principles of Criminal Law:

**CRIME = ACTUS REUS + MENS REA (concurring in time)**

Thus, from the above equation it is clear that generally 'crime' cannot be constituted either of one alone i.e. 'Actus Reus' or 'Mens Rea'. The standard common law of criminal liability is usually expressed in the Latin phrase, was first cited as a principle by Lord Kenyon C.J. in ***Fowler* v. *Pedger*** thus: "*It is a principle of natural justice and of our law that actus non facit reum nisi mens sit rea"*, which means "the act does not make a person guilty unless the mind is also guilty". Thus, in jurisdictions with due process, there must be an '*actus reus*' accompanied by some level of '*mens rea*' to constitute the crime with which the defendant is charged. For 'crime' it is both to be present. Let us study these principles one by one:

- **Actus Reus:** Actus Reus is a Latin term that means guilty act i.e. it may be an act of commission or an act of omission. This term has been given by Russell that means physical event. The essentials for actus reus are: the act must be voluntary, acts done while sleepwalking, epilepsy etc are not excluded except where such dangerous situations are created using the habit of the person known to the person who acts wrong. However, in some cases, law awards a punishment although the *'actus reus'* is not consummated. They are known to us as 'attempt', 'conspiracy' or even in some cases as 'preparation', which we have discussed earlier at length. Examples, 'm'

pushes 'y' in pond shows 'actus reus' whereas if 'm' and 'y' while walking near pond and 'm' slips and hit 'y' and y falls into pond does not comprise of 'actus reus'.

- **Mens rea:** Mens rea is Latin term that means guilty mind, which is considered as a Cardinal Doctrine of the Criminal Law. Thus, while making decision it has to be made clear that whether the 'actus reus' was intentional or it was a unintentional. Thus, state of mind has to be determined only then the puzzle will be broken. The concept of 'mens rea' developed in England during the latter part of the common-law era (about the year 1600) when judges began to hold that an act alone could not create criminal liability unless it was accompanied by a guilty state of mind. Example, Murder requires malicious state of mind where as larceny requires felonious state of mind.

## INTEXT QUESTIONS 8.1

1. Explain the basis of general principle of Criminal Law.
2. State briefly the necessary conditions for a 'crime'.
2. Expalin the meaning of the terms 'Actus Reus' and 'Mens Rea'.

## 8.2 GENERAL 'DEFENSES' IN CRIMINAL LAW

In Criminal Law there are number of 'defenses' available to the accused. These defenses are listed as below:

- **Insanity or mental disorder:** It is the most common defense used by the accused at large to negate the crime effect. Here the accused is declared to be suffering from mental disorder and is not able to take any sensible decision as the accused cannot make a difference between right and wrong.
- **Automatism:** It means there must have been a total destruction of voluntary control. This destruction of voluntary control excludes a partial loss of consciousness as the result of driving for too long. Thus, it is a state where muscles of our body act not through mind and / or loss of consciousness. Example, X fall faint as he or she by hearing a knock on the door.
- **Intoxication:** It is a state where a person in toxicated with some drug or chemical etc and that intoxicated person lose its control on mental capabilities. Thus, the focus of the defense of intoxication aims to declare the accused denial of mens rea, which means that the mental state of the accused was not guilty for actus reus. Example, m claims defense for a crime because of drug overdose.

- **Mistake of fact:** Mistake of fact is genuine and is accepted by law. This is yet another common defense by accused in criminal law, by saying I made a mistake" in conjunction with another defense. Example, a charge of assault on a police officer may be negated by genuine (and perhaps reasonable) mistake of fact that the person the defendant assaulted was a criminal and not an officer.
- **Necessity/lesser harm:** It means that when a criminal act is justified by highlighting that it was done to prevent much more harm that could have been done and faced. Example, 'X' claims that 'Y' was critically injured by 'X', as 'Y' a trespasser intended to put on fire the property of 'X'.
- **Lawful capacity of office and / or legal duty:** This defense is primarily used by the public servants to justify their act as covered and empowered by their authority. Example, a paramedic who forcibly enters a house or building in answer to an emergency call cannot be charged with breaking and entering. Likewise, when a policeman arrests a person on account of carrying of a gun in public that it was feared that the accused possibly could harm some innocent person(s), is not held guilty.
- **Self defense:** It is an act where a person takes a course of action and while in course of that action the defendant is injured. The accused may use the defense of self defense in this case. Example, 'X' claims that 'Y' intended to kill him/her. As a defense 'Y' claims that its course of action was an act of self defense. 'Y' claims that 'X' is a burglar and forcefully barged into his house and to protect its property 'Y' attacked 'X' and 'X' lost one of its limbs.

According to Indian Penal Code, accused may plead that he/she committed the alleged offense for justified causes that are socially accepted or that conform to moral principles.

1. Statutory Excuses that Exclude Transgression: Justifiable Defense and Averting Danger in an Emergency
2. Legally Prescribed Excuses for Mitigation:

**List of defenses described in Chapter IV of the Indian Penal Code (IPC)**

**The list of defenses described in Chapter IV of the Indian Penal Code (IPC) can be categorized as follows:**

- Judicial Acts
- Mistake of fact
- Accident
- Absence of criminal intent
- Consent

### List of 'Defences' described in chapter IV of the Indian Penal Code (IPC)

- Trifling acts
- Private defense

1. Act of a person bound by law to do a certain thing
2. Act of a Judge acting judicially
3. Act done pursuant to an order or a judgment of a Court
4. Act of a person justified, or believing himself justified, by law
5. Act caused by accident
6. Act likely to cause harm done without criminal intent to prevent other harm
7. Act of a child under 7 years
8. Act of a child above 7 and under 12 years, but of immature understanding
9. Act of a person of unsound mind
10. Act of an intoxicated person and partially exempted
11. Act not known to be likely to cause death or grievous hurt done by consent of the sufferer
12. Act not intended to cause death done by consent of sufferer
13. Act done in good faith for the benefit of a child or an insane person by or by the consent of guardian
14. Act done in good faith for the benefit of a person without consent
15. Communication made in good faith to a person for his benefit
16. Act done under threat of death
17. Act causing slight harm
18. Act done in private defense

## INTEXT QUESTIONS 8.2

1. Define 'Defences' as described in Criminal Law?
2. Give a list of 'Defences' as described in chapter IV of the Indian Penal Code (IPC)

## 8.3 RIGHT TO INFORMATION

The Right to information (RTI) was much more sought than ever. This was due to increasing volume of corruption and unwanted delays in the work. The public at large was getting harassed, mentally as well as physically and also financially. To put a check on it RTI act enacted by Government of India in year 2005.

**Right to Information Act 2005** mandates timely response to citizen requests for government information. It is an initiative taken by **Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pensions** to provide a– ***RTI* Portal** Gateway to the citizens for quick search of information on the details of first Appellate Authorities, PIOs etc. amongst others, besides access to RTI related information / disclosures published on the web by various Public Authorities under the Government of India as well as the State Governments. The aim of RTI is, **"Bringing Information to the Citizens"**. This Act is updated till February 2011.

## The Act

This Act is comprised of six Chapters and total of thirty-one Sections and two Schedules. The first chapter explains preliminary aspects of the act like, definitions, titles and commencements etc. The second chapter explains right to information and obligations of public authorities, sections so covered are, right to information, obligation of public officer, designation of public officers, request for obtaining information, disposal of request, exemptions, grounds for rejection of application, severability and third party information. The third chapter explains about the central information commission, sections covered under this chapter are, constitution of central commission, term of office, conditions of service and removal of CIC. The first fourth explains state information commission which operates at the state level. This chapter is comprised of similar sections of chapter three but at state level, like constitution of state commission etc. The fifth chapter explains the various powers and functions of CIC at the central level and also at the state level as well as penalties and appeals are also covered under this chapter. The chapter is comprised of the sections like, power and functions of CIC, appeals and penalties. The last and the sixth chapter is about miscellaneous aspects of the act. This is longest chapter of the act that is contains 11 sections. The sections are, bonafide protection of action, overriding effect, jurisdiction of courts, non application of act on certain organizations, monitoring and reporting, appropriate Government to prepare programmes, power to make rules by appropriate government, power to make rules by competent authority, lying of rules, power to remove difficulties and repeal.

## Guidelines

The Government of India has also issued guidelines to the information seekers to ease their work and efforts in the process. These guidelines are comprised in the official public document, **"How To Get Information From The Public Authorities Of The Central Government Under The Right To Information Act, 2005"**

This document, which is comprised of 17 topics, explains the various aspects of the process to ease out the hurdles in obtaining the information by the information seeker. These topics are broadly explained as under:

1. Foreword
2. Object of the right of information act
3. What is information
4. Right to information under the act
5. Exemptions from disclosure
6. Central public information officers
7. Assistance available from CPIO's
8. Suo motu disclosure
9. Method of seeking information
10. Fee for seeking information
11. Format of application
12. Disposal of the request
13. First appeal
14. Second appeal
15. Complaints
16. Disposal of appeals and complaints by the CIC
17. Important websites

## INTEXT QUESTION 8.3

1. Explain briefly the reasons for the enactment of Right to Information Act, 2005.
2. Name the official Public Document containing Guidelines for the information seekers.
3. State briefly the main aim of passing the Right to Information (RTI) Act, 2005.
4. Fill in the blanks
   (a) The Right to Information Act, 2005 contains ..... Chapters, ..... Sections and ..... Schedules.
   (b) The Right to Information Act, 2005 is updated till .....

Notes

## WHAT YOU HAVE LEARNT

- Criminal Law is based on the principles of 'Actus Reus' and 'Mens Rea'. There must be an 'Actus Reus' accompanied by some level of 'Mens Rea' to constitute the 'crime' with which the defendant is charged. For 'crime', it requires both to be present. These terms mean that the 'Act does not make a person guilty unless the mind is also guilty'.
- There are number of 'defences' available to the accused. These defences are – insanity or mental disorder, automatism, intoxication, mistakes of facts, necessity/lesser harm lawful capacity of office and/or legal duty and self- defence. Besides these defences, chapter IV of the Indian Pendal Code (IPC) describes as many as Eighteen 'defences'.
- The Right to Information Act, 2005 was enacted with the aim of bringing informatiyon to the citizens. The main reasons for the enactment of this Act (RTI) were increasing volume of corruption, unwanted and un-necessary delay in the work and lack of transparency in the functioning of Government and its Agencies. This Act contains six Chapters, thirty-one Sections and two Schedules. This Act (RTI) has been updated till February, 2011.

## TERMINAL QUESTIONS

1. What is the literal meaning of 'Actus Reus'?
2. What is the literal meaning of 'Mens Rea'?
3. What is the full form of 'RTI'?
4. What is essential for a 'crime'?
5. Define the term 'Actus Reus'.
6. Define the term 'Mens Rea'.
7. Define 'crime' as stated in Criminal Law.
8. What are the various general 'defenses' available to the wrong-doer in Criminal Law?
9. Explain briefly the main provisions of RTI Act, 2005.
10. List the Defences as described in chapter IV of the Indian Penal Code (IPC).
11. List the 'guidelines' laid by the RTI Act to file a RTI.
12. List 'Defenses' as described in Chapter IV of the Indian Penal Code.
13. What are general 'defenses' available to the offender of a Crime?

## ANSWERS TO INTEXT QUESTIONS

### 8.1

1. The general principle of Criminal Law is based upon the term 'Actus Reus' and 'Mens Rea'.
2. The necessary conditions for crime is based upon the following equation:

   CRIME = ACTUS REUS + MENS REA (concurring in time)
3. 'Actus Reus + Mens Reas means that an act alone could not creat 'criminal liability' unless it is accompanied by a guilty state of mind.

### 8.2

1. 'Defenses' in Criminal Law refer to the 'remedies' available to the defendant to plead not guilty for the charges being made in the case against the defendant. Therefore, these defenses are the pleas given by the defendant in the trial of the case to prove his / her innocence against the charges being levied on the defendant by the plaintiff
2. Following are the 'Defenses' available to the defendant to prove that he / she is not guilty:

   These 'defenses' are provided in two lists these are as follows:

   (i) List of defenses described in Chapter IV of the Indian Penal Code (IPC)

   1. Act of a person bound by law to do a certain thing
   2. Act of a Judge acting judicially
   3. Act done pursuant to an order or a judgment of a Court
   4. Act of a person justified, or believing himself justified, by law
   5. Act caused by accident
   6. Act likely to cause harm done without criminal intent to prevent other harm
   7. Act of a child under 7 years
   8. Act of a child above 7 and under 12 years, but of immature understanding
   9. Act of a person of unsound mind
   10. Act of an intoxicated person and partially exempted
   11. Act not known to be likely to cause death or grievous hurt done by consent of the sufferer

Notes

12. Act not intended to cause death done by consent of sufferer
13. Act done in good faith for the benefit of a child or an insane person by or by the consent of guardian
14. Act done in good faith for the benefit of a person without consent
15. Communication made in good faith to a person for his benefit
16. Act done under threat of death
17. Act causing slight harm
18. Act done in private defense

(ii) The list of defenses described in Chapter IV of the Indian Penal Code (IPC) can be categorized as follows:

1. Judicial Acts
2. Mistake of fact
3. Accident
4. Absence of criminal intent
5. Consent
6. Trifling acts
7. Private defense

## 8.3

1. The main reasons for the enactment of Right to Information were (i) increasing volume of corruption, (ii) unwanted delay in the work and (iii) lack of transparency
2. "How to get Informaton from the Public Authorities of the Central Government under the Right to Information"
3. The aim of Right to Information Act, 2005 is to 'bring information to the citizens'.
4. (a) Six Chapters, Thirty-one Sections and two Schedules

   (b) February, 2011

Notes

# 9

# TERRITORIAL LAW

There are many ways to sub divide or classify the Law. It can be on the basis of subject matter like 'Substantive Law' and 'Procedural law, Civil Law and Criminal Law, Personal Law and Public Law, Property Law, Contact Law etc. Similarly, one classification of 'Law' can be on the basis of Territory.'

Law is territorial in the sense that its operation itself is territorial. Generally, the Laws made by the State are applied to persons, things and events which are within its territorial jurisdication. In other words the enforcement of Law is confined to the territorial boundaries of the State enforcing it. However, there may be cases where there can be extra-territorial operation of Law. Extra-territorial operation of Law means that it also operates outside the limits of the territory of the state which eancted that particular Law.

## OBJECTIVES

After studying this lesson you will be able to:

- understand the meaning of 'Territorial Law';
- understand the meaning of 'Central Laws;
- explain the meaning of 'State Laws';
- describe the 'Local Laws';
- identify the 'Municipal Laws';
- identify the 'Autonomous Law';
- make a distinction between 'Supreme Legislation' and 'Subordinate Legislation'; and
- understand the meaning of 'Customary Law'.

## 9.1 TERRITORIAL LAW

A Territorial Law is a '*lex loci*' or law of a particular place and applies to all persons inhabiting the territory of a State irrespective of their personal status.

Notes



'Law' as a body of rules is generally applied in the administration of Justice. Usually it is linked to some territory and is enforced by the Sovereign of the territory concerned.

When one speaks of the law of India, one does not mean merely that the law in question is enforced in India. Such a statement postulates not merely the territorial enforcement of law, but the territoriality of the law itself. Usually the laws made by the legislature apply to persons and things which are within its jurisdiction or in respect of acts and events taking place within such jurisdiction.

Territorial Law in the context of international scenario is otherwise addressed as the Municipal Law or the domestic law of the country. Municipal Law is the National, Domestic, or Internal law of a Sovereign State defined in opposition to International Law. Municipal Law in the context of International Law includes not only the law at the National level, but also the law at the State/Provincial or local levels. Classification of laws as Central Law, Provincial/State Law and Local Law when taken together gives a holistic idea of the Territorial Law. Citizens are subjected to a variety of laws made by Central, State and Local Legislative and Administrative bodies. In general, all laws are part of a hierarchy in which Central Laws are at the top, Local Laws at the bottom and State Laws somewhere in between. However, the other classifications of laws such as, Substantive Law, Procedural Law, Civil Law, and Criminal Law can be included under the scope of Territorial Law taking into consideration the matter of enforcement.

Substantive Law generally deals with the rights and obligation of the parties irrespective of residence of the citizens, e.g. Indian Contract Act 1872, Consumer Protection Act, 1986, Right to Information Act, 2005 etc.

Similarly, the Procedural Laws cover the procedural aspect of implementation of Substantive Laws, e.g. the Criminal Procedure Code, 1973, the Civil Procedure Code, 1908, the Evidence Act, 1882, the Limitation Act, 1963 etc.

Law has to be enforced by a State and the power of the State does not extend beyond the reach of the State. However, the mutual interest of States in the maintenance of order and justice demands that States should co-operate with one another.

A legal system belonging to a defined territory means partly that its rules do not purport to apply extraterritorially, partly that those who apply and enforce them do not regard them as applying extraterritorially and partly that other States do not so regard them. The above statement needs certain qualifications. A system of law applies only to persons, things, acts and an event within a defined territory is not a self–evident truth; it is merely a generalization from the practice of States.

Notes

**Do you know**

### Theory of territorial nexus

Article 245 (1) of Indian Constitution provides that a State Legislature may make laws for the territory of that State. The State Legislature cannot make extra territorial laws, except when there is sufficient connection or nexus between the State and the object i.e. subject matter of legislation (object may not be physically located within the territorial limits of State).

### Extra-Territorial Operation of Parliamentary Law

Article 245 (2) of Indian Constitution provides that no law made by the Parliament would be invalid on the ground that it would have extra-territorial operation i.e. takes effect outside the territory of India.

## INTEXT QUESTIONS 9.1

1. Define Territorial Law.
2. Explain the 'Theory of Territorial nexus'.
3. Explain 'Extra-Territorial operation of Parliamentary Law'.

## 9.2 CENTRAL LAWS

The Laws made by the Union of India are otherwise known as Central Laws. Article 245 provides that Parliament may make laws for the whole or any part of the territorial area and the legislature of the State may make laws for the whole or any part of the State. Similarly Article 246 of the Indian Constitution deals with subject matter of Laws made by Parliament and by the Legislature of States. Schedule VII of Indian Constitution provides three lists enumerating matters over which power to legislate lies. These lists are 'Union List', 'State List' and 'Concurrent List'. Parliament has the exclusive power to make any law with respect to any matter not enumerated in the 'Concurrent List' and 'State List'.

The power to legislate upon the matters enumerated in the 'Union List' specifically lies with the Union Govt. This list contains 97 entries. The entries are generally the matters of national importance. The laws made by the Union Government over the subjects mentioned in the 'Union List' are generally classified as Central Laws. These laws are applicable to the whole country. However, each Law/Statute has its own jurisdiction expressed in the term of applicability. The extent of application of the Act is generally given at the

Notes

beginning of the Act. In India, in most of the cases normally it excludes the State of Jammu and Kashmir from the operation and enforcement of Law. The Central Laws are legislated by the Parliament of India. The Parliament includes Lok Sabha (House of Representatives or the Lower House), Rajya Sabha (Council of States or the Upper House) and the President. The matter over which law is required to be made can be introduced in either House of the parliament in the form of a Bill. Then the bill is discussed and debated in that house and if passed with requisite majority, it is moved to the other house for discussion. If the other house passes it with requisite majority, then it is sent to the President for the assent. After getting the assent of the President, it becomes an Act. It is pertinent to mention here that for the administration of Justice the power of legislation is entrusted to the legislative wing i.e. the Parliament & the State Legislatures. The power to execute, the Laws rests with the executive wing i.e. the Administrative authorities of Central and State governments and the interpretation of the laws rest with the Judiciary. When the bill is converted to an Act after getting the assent of the President, the Supreme Court examines the Act in the light of constitutional provisions to see that it does not violate any provisions of the Constitution of India and declares the law as valid. If at any point of time, the Supreme Court of India observes the violation of provisions of the Constitution, then it has the power and authority to declare it as unconstitutional and hence null and void.

The jurisdiction of the Central Laws, as we know covers the whole of India irrespective of the State jurisdiction. It is already mentioned that the Union Government has the power to legislate on the subjects contained in the 'Union List' but it can also legislate in the State matters on certain occasions. Article 249 of the Indian Constitution gives the power to the Parliament to legislate with respect to a matter in the 'State List' in the national interest. It describes if the Council of States (Rajya Sabha) has declared by a resolution supported by not less than two-third of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the 'State List' specified in the resolution, it shall be lawful for the Parliament to make laws for the whole or any part of the territory of the India with respect to that matter while the resolution is in course. A resolution passed under the above mentioned clause shall remain in force for such period (not exceeding one year) as may be specified therein. If the continuance of the resolution is approved with requisite procedures it can be extended for a further period of one year. It will cease to have effect on the expiry of six months and the resolution ceases to be in force.

Similarly Article 250 of Indian Constitution confers the powers on the Parliament to legislate with respect to any matter in the 'State List' if a proclamation of Emergency is in operation. There are nearly about 1221 Central Laws as upto 2010. The Indian Penal Code 1860, The Code of Criminal Procedure 1973, The Code of Civil Procedure 1908, The Indian Evidence Act 1872, The Indian Contract Act 1872 etc are some of the examples of Central Laws in India.

## Distribution of Legislative Subjects

'Legislation' is the process of making a law. The Constitution makes a twofold distribution of legislative powers:

1. With respect to territory, the ambit of which is discussed under territorial legislative jurisdiction, covered under Article 245 of Indian Constitution.
2. With respect to subject matter of legislation (i.e. three lists)

There are three lists which provide for distribution of legislative power under Seventh Schedule to Indian Constitution –

a. Union List (List I) – It contains 97 items and comprises of subjects which are of national importance. Only the Union Parliament can legislate with respect to these matters e.g. Defence; Foreign Affairs, Banking, Currency, Union Taxes, etc.

b. State List (List – II) – It contains 66 items and comprises of subjects of *local* or *State* interest and thus lie within the legislative competence of the State Legislatures, viz. Public Order and Police, Health, Agriculture, etc.

c. Concurrent List (List III) – It contains 47 items, with respect to which, both Union Parliament and the State Legislature have concurrent power of legislation. The Concurrent List (not found in any other federal Constitution) was to serve as a device to avoid excessive rigidity to a two-fold distribution. It is a 'twilight zone', as for to so important matters, the States can take initiative, while for the important matters, the Parliament can do so. Besides, the States can make supplementary laws in order to amplify the laws made by Union Parliament. The subjects include general laws and social welfare – civil and criminal procedure, marriage, contract, planning education, etc.

## ACTIVITY 9.1

**Do you know?**

- Who is the President of India?
- Who is the Vice President of India?
- Who is the Chief Justice of India?
- Who is the Prime Minister of India?
- Who is the Speaker of Lok Sabha?
- Who is the Chairman of Rajya Sabha?

Notes

## INTEXT QUESTIONS 9.2

1. Define Central Laws.

Tick out (√) the correct response

2. The State List Contains

   (a) 66 entries (b) 97 entries

   (c) 82 entries (d) 77 entries

3. In case of conflict between Union and State Laws normally which prevails

   (a) State Law Prevails (b) Union Law Prevails

   (c) No suit prevails (d) None of the above

## 9.3 STATE LAWS

The laws made by the State Legislature are known as 'State Laws'. It has the jurisdiction and applicability over the territory of the State which has legislated it. As already discussed the State Government has the jurisdiction to legislate upon the matters enumerated in the State List of Schedule VII. This list contains 66 items which concern the interest of the State. Each State is free as per their requirement to make laws which is applicable and enforced in that State only. In case of the violation, the individuals of the State can approach the respective courts of that States for seeking justice. Some of the examples of State made laws are as follows:

### Laws enacted by Orissa State Legislature

The Orissa Municipal Corporation Act, 2003

The Orissa Urban Police Act, 2003

The Orissa Value Added Tax Act, 2004

### Laws enacted by Madhya Pradesh State Legislature

Madhya Pradesh Nagarpalika Vidhi (Sanshodhan) Adhiniyam, 2009

The Madhya Pradesh VAT (Amendment) Act, 2010

The Madhya Pradesh Karadhan (Amendment) Act, 2009

The Madhya Pradesh Gram Nyalaya (Nirsan) Adhiniyam, 2009

### Inconsistency between Union and State Laws

Article 254 of Indian Constitution provides that "if any provision of a Law made by State Legislature is repugnant to any provision of a Law made by Parliament

which Parliament is competent to enact, or to any provision of an existing law with respect matters enumerated in Concurrent List, then the Parliamentary Law whether passed before or after State Legislatures' Law or existing Law shall prevail and 'State Law' to the extent of repugnancy be void".

'Article 254 (1) enumerates the rule that in the event of a conflict between a Union and State Law, the former prevails'. The Union Law may have been enacted prior to the State Law and subsequent to the State Law. The principle behind when there is legislation covering the same ground both by the Centre and by the State, both of them competent to enact the same, the Central Law should prevail over the State Law. The expression 'Existing Law' refers to laws made before the commencement of the Constitution by any Legislature, Authority etc. some of the examples are Criminal Law, Civil Procedure, Evidence, Contact, Consumer Protection etc.

The repugnancy here means irreconcilable inconsistency. The provisions of two Acts should be such that they can stand together or operate in the same field. If they can operate in the same field relating to the same entry in the same list without coming into conflict with each other.

## Predominance of Union Law and Limitations of State Legislatures

1. 'In case of overlapping between three lists, regarding a matter, the predominance is given to the Union Law'.
2. In the concurrent sphere in case of repugnancy or inconsistency between Union and State Laws relating to the same subject, Union Law prevails.
3. *Extensive nature of Union List* – Some subjects normally intended to be in the jurisdiction of the States are in the Union List e.g. Industries, Election and Audit, Inter State Trade etc.
4. *'Residuary Powers'* – 'Power to legislate with respect to any matter not enumerated in any three lists is given to the Union'. e.g. Imposition of taxes.
5. *Expansion of powers of Union Legislature under certain circumstances* – In the following situations, Parliament can legislate with respect to State List subjects:
    a. When Council of States (Rajya Sabha) declares by a resolution of Two-third majority that it is necessary in national interest.
    b. Under a Proclamation of Emergency.
    c. Failure of constitutional machinery in a State.
    d. By agreement between States, with the consent of State Legislatures.
    e. To implement to International Treaties and Agreements.

Notes

6. Certain types of bills cannot be moved in State Legislatures without previous sanction of the President. Also certain bills passed by State Legislatures cannot become operative until they receive the President Ascent, after having been reserved for his consideration by Governor of State.

**Do you know**

**Legislations in India and their territorial application in the State of Jammu & Kashmir:-**

In India most of the legislations exclude State of Jammu Kashmir from its applicability because the State of Jammu &Kashmir has been given a special status by virtue of Article 370 of Indian Constitution.

**Ordinance making power of the President of India and Governor of the States**

The most important power of the President is his/her power of issuing ordinances given under Article 123 of Indian Constitution. It is the power to legislate when both houses of Parliament are not in session. Similarly, the Governor of the State enjoys such power under Article 213 of Indian Constitution. The ambit of this power is coextensive with the legislative power of the Parliament i.e. it may relate to any subject which Parliament can legislate and is also subject to the same constitutional limitations, as the legislation by the Parliament. However, the President can withdraw the ordinance at any time.

## ACTIVITY 2

**Do you know?**

- Who is the Governor of the State of Odisha?
- Who is the Chief Minister of Odisha?
- Who is the Chief Justice of Odisha High Court?
- Who is the Speaker of Odisha State Legislative Assembly?

## INTEXT QUESTIONS 9.3

1. Define State Laws
2. Fill in the blanks.
   (i) _____ enumerates the rule that in the event of a conflict between a Union and State Law, the former prevales.

(ii) In case of overlapping between three list regarding a matter of predominance is given to the _____.

(iii) Power to legislate with respect to any matter not enumerated in any three lists is given to the _____.

(iv) State List contains _____ subjects.

(v) Union List contains _____ subjects.

## 9.4 LOCAL LAWS

'Local Laws' refer to laws applicable to the locality of a territory within a State. The 'Local Law' is the law of a particular locality and not the general law of the country. It may be of two kinds:

a. Local Enacted Laws

b. Local Customary Laws

The Local Enacted Law has its source in the local Legislative Authorities or Municipalities or other corporate bodies empowered to govern their spheres by bye-laws, supplementary to the general law.

The power and authority to legislate Local Laws normally rests with the Local Governments. However the State Legislature is also empowered to legislate upon local matters.

## INTEXT QUESTIONS 9.4

1. Define Local Laws.

## 9.5 MUNICIPAL LAWS

Provisions relating to Local Governments which mean Rural Local Government and Urban Local Government are the Panchayat Law and Municipal Laws in India.

As per 73rd Constitutional Amendment Act, 1992, the Rural Local Government means and includes:

a. Gram Panchayat at the Village Level;

b. Panchayat Samiti at the Block Level; and

c. Zilla Parishad at the District Level

Similarly as per 74th Constitutional Amendment Act, 1992 Urban Local Government means and includes:

a. Nagar Panchayat (NAC – Notified Area Council in case of Orissa) for a transitional area i.e. an area in transition for a rural area to an urban area;

b. Municipal Council for a smaller urban area; and

c. Municipal Corporation for a larger Urban Area.

The 73rd and 74th Constitutional Act, 1992 have been ramification of the concept of democratic decentralization. The rationale behind this process of democratic decentralization is that the problem affecting the locality can be better handled by the local people. The idea or objective of these amendments is to empower the local people. Schedule Eleventh of the Constitution relating to Rural Local Government and Schedule Twelfth relating to Urban Local Government were annexed to the Schedules to the constitution of India. Schedule Eleventh contains 29 functional items over which the power to make laws can be exercised by the Rural Local Governments. Similarly Schedule Twelfth consists of 18 functional items over which the Urban Local Governments are free to make laws. So, it is pertinent here to mention that while enacting the laws concerning the locality, the interest of the local people is paramount. However, the State is also free to legislate in the matters enumerated in eleventh and twelfth schedule in the greater interest of the State.

## INTEXT QUESTIONS 9.5

1. Discuss the scope of decentralization with reference to 73rd & 74th Constitutional Amendment Act, 1992.

**Fill in the Blanks:**

2. Urban Local Govt. relates to ..... Amendment of Constitution of India.
3. Twelth Schedule to the Indian Constitution deals with ..... form of Local Government.
4. Eleventh Schedule to the Indian Constitution deals with ..... form of Local Government.
5. The ..... Constitutional Amendment Act, 1992 relates to Rural Local Government.

## 9.6 TYPES OF LEGISLATION

1. **Supreme Legislation:** 'Legislation' is said to be supreme when it is proceeded from the supreme or sovereign power of the Parliament and State Legislatures. It is incapable of being repealed, annulled or controlled by any other legislative authorities.
2. **Subordinate Legislation:** 'Legislation' is set to be subordinate when it is proceeded from any authority other than supreme subordinate authority. It is made under the powers delegated to it by the Supreme Authority. There are five forms of subordinate legislation.
   a. **Executive** – The rule making power under the Statuets is conferred on the Executive (i.e. the branch of the Government that executes the laws or runs the administration).
   b. **Judicial** – The Judiciary has powers to frame rules for the regulation of their procedures and administration.
   c. **Municipal** – Powers are delegated to Mancipal Bodies by the Act, which brings them into existence to frame rules and by-laws for the area under their jurisdiction for carrying on various activities entrusted to them.
   d. **Autonomous** – The Autonomous Bodies, like Universities are given power by the State to make rules and by-laws for their administration.
   e. **Colonial** – The laws of the countries which are not independent or which are the control of some other State are subject to the supreme legislation of the State under who control they are.

Power to legislate normally rests with the Parliament and State Legislatures. However, in some matters this power of legislation can be transferred to the Administrative Authorities.

## INTEXT QUESTIONS 9.6

1. Write a short note on Subordinate Legislative.
2. Define Supreme Legislation.

## 9.7 AUTONOMOUS LAW

There are a large number of Corporations standing outside the governmental system, which are invested with the powers of making bye-laws for themselves and in many cases for the public at large. Such Corporations are called 'Public Utility Concerns', for example, Authorities for Transport, light, heat, water, etc. these corporations administer laws strictly called 'autonomous' in as much as

Notes

they concern directly only the members of a particular Corporation. The most familiar example is the 'Articles of Association of a Joint-Stock Company'. The Bye-laws of a Railway Company, the Rules made by a University are some of the instances of Autonomous Law.

## INTEXT QUESTIONS 9.7

1. Give any two examples of 'Autonomous Law.'

## 9.8 CUSTOMARY LAW

By *'Customary Law'* is meant those rules and principles which have been observed in a particular community in actual practice for a long time. These rules are having the effect of Law. In essence, Customary Laws are the part of the Local Laws applicable to a particular locality within a State where it is observed. It has its roots in those in immemorial 'Customs' which prevail in a particular part of the State and, therefore, have the force of law. They come into existence due to a number of reasons. When some kind of action gets general approval and is generally observed for a long time it becomes a 'Custom'. Sometimes they come into being on the ground of expediency. Other reasons for their coming into existence are imitation, convenience etc. When they are recognized by the State they become a part of the 'Civil Law'. There is a difference of opinion among the jurists about the scope and the authority of the 'Customs'. Some say that 'Customs' are valid law. Others say that they are simply a source of law.

### Requisites of Valid Customs

In order to be a Valid Custom it must conform to certain requirements laid down by the law, which are as follows:

a. Reasonableness
b. Consistency
c. Compulsory Observance
d. Continuity and Immemorial Antiquity
d. Certainty

## INTEXT QUESTIONS 9.8

1. Define Customary Law.
2. Mention True or False
   (i) Immemorial Antiquity is a valid essential of Customary Law. (True/False)
   (ii) Consistency is a valid essential of customary Law. (True/False)

(iii) Reasonableness is a vaild essential of Customary Law. (True/False)

(iv) Compulsory Observance is a valid essential of a Customary Law. (True/False)

## WHAT YOU HAVE LEARNT

Law is the body of principles recognised and applied by the State in the administration of Justice. Law can be described in terms of legal order accepted by society at large functioning within the limits of States. There are many ways to classify the Law. It can be classified on the basis of subject matter like Substantive Law and Procedural Law, Civil Law and Criminal Law, Personal Law, property Law, Law relating to contract and Law of Torts etc. On the basis of Jurisdictions exercised by the State or Government. The Laws can also be classified on the basis of Territorial Jurisdiction as Central Laws, State or Provincial Laws and Local Laws.

A Territorial Law is a *'Lex Loci'* or Law of a particular place and applies to all persons inhabiting territory of a State irrespective of their personal status. Usually it is linked to some territory and it is enforced by the Sovereign of the territory concerned.

'Territorial Law' in the context of international Scenario is otherwise addressed as Municipal Law or t he Domestic Law of the country. Municipal Law in the context of International Law includes not only the law at the National level, but also the law at the State or provincial or local levels.

'Substantive Law' generally deals with the rights and obligation of the parties irrespective of residence of citizens Procedural Laws cover the procedural aspect of implementation of Substantive Laws.

Laws have to be enforced by a State and the power of the State does not extend beyond the reach of the State.

The Laws made by the Union of India are generally known as Central Laws. The Jurisdiction of the Central Laws covers the whole of India irrespective of the state Jurisdiction. The Laws made by the State Legislature are known as State Laws. They have Jurisdiction and applicability over the territory of the State which has legislated it.

The Local Law is is the law of a particular community and not the general law of the country.

Provisions relating to Local Government which mean Rural Local Government and Urban Local Government are the Panchyat and Municipal Law in India.

The Bye Laws of Corporations and Articles of Association of Joint Stock Company and the Rules made by a University are some of the instances of Autonomous Law.

By 'Custousary Law' is meant those rules and principles which have been preserved is a long time. These rules have the effect of Law.

## TERMINAL QUESTIONS

1. Describe the important principles concerning application of Territorial Law.
2. Central Laws have the prevalence over State and Local Laws – Explain.
3. The autonomy granted to local bodies under 73rd & 74th to Constitution of India is sufficient – Give your views.
4. Discuss the power of President of India and the Governor of a State to promulgate Ordiances.
5. Explain the types of legislation normally prevailing in India.
6. Describe of 'Doctrine of Extra-Territorial Nexus'.
7. Describe in brief the various principles of interpretation relating to the lists provided under Schedule Seventh to Indian Constitution.
8. Explain the Principles of Customary Law.
9. Describe in brief the concepts of 'Autonomous Law' and 'Municipal Law'.
10. Differentiate between International Law and Territorial Law in the context of International Scenario.
11. Write short note on 'Panchayati Raj System' in India.
12. Write short note on 'Application of Central Laws' in India.
13. Write a short note on 'Supreme Legislation'.

## ANSWER TO INTEXT QUESTIONS

**9.1**

1. Territorial Law represents to the Law of a particular territory. A territorial law is a *'lex loci'* or law of a particular place and applies to all persons inhabiting the territory of a State irrespective of their personal status. Law as a body of rules is a generally applied in the administration of Justice. Division/classification of laws as Central Law, Provincial/State Law and Local Law when taken together gives a holistic idea of the territorial law. Citizens are subject to a variety of laws made by Central, State and Local Legislative and Administrative Bodies. In general, all laws are part of a hierarchy in which central laws are at the top, local laws at the bottom and state laws somewhere in between.

2. **Theory of Territorial Nexus:** Article 245 (i) of Indian Constitution provides that a State Legislature may make Laws for the Territory of that State. The State Legislature cannot make extra-territorial Law, except when there is sufficient connection or nexus between the state and the object i.e. subject matter of Legislation (object may not be physically located within the territorial limis of the state).
3. **Extra-Territorial operation of Parliamentary Law:** Article 245(2) of Indian Constitution provides that no law made by the Parliment would be invalid on the ground that it would have extra-teerial operation i.e. takes effect outside the territory of India.

## 9.2

1. Laws made by the Union or Central government are known as Central Laws.
2. 66 Enteries
3. Union or Central Laws.

## 9.3

1. The Laws made by the State Legislature are known as State Laws. It has the jurisdiction and applicability over the territory of the State which has legislated it. State government has the jurisdiction to legislate upon the matters enumerated in the state list of Schedule VII. This list contains 66 items which concern the interest of the State. Each state is free as per their requirement to make laws which is applicable and enforced in that State only. In case of the violation, the individuals of the State can approach the respective courts of that states for seeking justice.
2. (i) Article 254(1)
   (ii) Union Law
   (iii) Centre or Union
   (iv) 66
   (v) 97

## 9.4

1. Local Laws refer to Laws applicable to the Locality of a Territory within a State. 'Local Law' is the Law of a particular locality and not the general Law of the country.

## 9.5

1. The 73$^{rd}$ and 74$^{th}$ Constitutional Act, 1992 have been ramification of the concept of democratic decentralization. The rationale behind this process of democratic decentralization is that the problem affecting the locality can

be better handled by the local people. The idea or objective of these amendments is to empower the local people. Schedule Eleventh relating to Rural Local Government and Twelfth Schedule relating to Urban Local Government were annexed to the Schedules to the Constitution of India. Schedule Eleventh contains 29 functional items over which the power to make laws can be exercised by the Rural Local Governments. Similarly Schedule Twelfth consists of 18 functional items over which the urban local governments are free to make laws. So it is pertinent here to mention that while enacting the laws concerning the locality, the interest of the local people is paramount.

2. $74^{th}$
3. Urban
4. Rural
5. $73^{rd}$

## 9.6

1. **Supreme Legislation:** 'Legislation' is said to be Supreme when it is proceeded from the Surpeme or Sovereign power of the parliament and State Legislations. It is incapable of being repealed annualled or controlled by an other Legislative authorities.
2. **Subordinate Legislation:** Legislation is set to be Subordinate when it is proceeded from any authority other than Surpeme subordinate authority. It is made under the powers delegated to it by the Surpeme Authority.

## 9.7

1. The two examples of Autonomous Law are:
   (i) Articles of Association of a Joint Stock Company and
   (ii) Rules made by a University

## 9.8

1. By 'Customary Law' is meant those rules and principles which have been observed in a particular community in actual practice for a long time. These rules are having the effect of Law.
2. (i) True
   (ii) True
   (iii) True
   (iv) True

Notes

10

# CIVIL AND CRIMINAL LAW

Various types of law exist in any legal system.Some consist of the rules which regulate the offences and infringment of rights of others. On this basis, law may be broadly divided into two categories: Civil Law and Criminal Law. These two categories are the two broad and separate entities of law with separate sets of rules to deal with civil wrongs and criminal wrongs respectively. Thus it is important to understand the nature of the division, because there are fundamental differences in the purpose, procedure and terminology of each branch of law. Whereas Civil Law deals with the body of rules which defines civil rights and obligations and its remedies, where as criminal law defines the rules relating to public rights and the liabilities for any infringements. That is why Civil Law is quite distinct from criminal law. In this chapter, you will understand the nature of civil and criminal law and the basic differences between the two.

## OBJECTIVES

After stuying this lesson, you will be able to:

- know the definition and nature of Civil Law and Criminal Law;
- to understand the need and importance of these laws in the society;
- be aware of the rights covered under Civil Law and Criminal Law as well as the remedy available for their violation;
- know about the Forums available for the redressal of grievances relating to Civil and Criminal matters;
- know the different types of relief to be granted for violation of these laws; and
- make a distinction between Civil and Criminal Law.

## 10.1 CIVIL LAW – DEFINITION AND NATURE

**Civil Law** is nothing but the Law of the State or Law of the land. It is the area of laws and justice which affect individual's legal status. The term 'Civil Law' is derived from Roman language *"jus civili", which means that it is the Law of*

*the Civitas i.e., the State.* This branch of law deals with rights, duties and obligations of individual members of the society among themselves. Sometimes it is also called as municipal law. The jurists of medieval period call Civil Law as "*jus positivum*", means the Positive Law made by human beings against the law made by God. It is considered as positive law because it deals with law in its present context. Civil Law includes various aspects such as laws relating to property, contract, tort, family, trade, intellectual property and environment etc.

The objective of Civil Law is to rectify the wrongs, or to settle the disputes in an amicable manner rather than in a stringent way. If there is a damage, the party is to get compensation from the wrong door. In Civil Law, a dispute commences when the injured party files a complaint against the opposite party. Under Civil Law, the victim/injured is awarded compensation for the injury caused to him/her. For instance, if an accident victim/injured claims damages against the driver for loss or injury sustained to him/her in the accident, this will be a matter regulated by Civil Law.

Civil Law not only deals with the disputes between private parties, but also with the negligent acts of the individuals that cause harm to others. For example, when there is a disagreement between two parties regarding the terms of a contract or regarding the ownership or possession of a property, or wrongful dismissal of a person from his employment, the aggrieved party may get relief under Civil Law by approaching the Court to decide the matter. Similarly, when somebody fails to exercise the degree of caution that an ordinarily prudent person would take in any situation to avoid any kind of negligent act, the other party may approach the court to get remedy under Civil Law. The basic principle is that if there is a violation of a legal right of a person, the same is actionable, irrespective of the fact whether the plaintiff has suffered any actual loss or not. Taking into consideration the circumstances and the seriousness of the matter, a person may be held responsible for any damages or injury that was caused as a result of his wrongful act. Disputes relating to family matters such matters involving marriage, divorce, maintenance, inheritance, succession, division of property between spouses also represent a large portion of the cases covered under civil law. The complainant in a civil case is called as 'plaintiff' or applicant and the party against whom the case is filed, is known as the defendant or 'respondent'. The Courts has discretion either to dismiss a case if it is found to have no merit, or may order the losing party to pay compensation to the aggrieved party for the harm suffered by him or her. The State has no role to play in civil matters, unless the government itself is the party in it.

### 10.1.1 Contributory Negligence

The 'Contributory Negligence' means such negligence to which the 'plaintiff' and also the 'defendant' contribute. The 'plaintiff' and the 'defendant' are both responsible for such negligence. But it is to be found out who is more responsible for the harm caused by such negligence.

For example, the plaintiff tied the fore feet of his donkey with a rope and left it on the highway to graze. The defendant injured the donkey while driving negligently. The defendant had the opportunity of avoiding the accident. Had he driven his car carefully, the accident would not have occurred. So the defendant was liable for the injury caused to the plaintiff's donkey although the plaintiff was also negligent to some extent.

## INTEXT QUESTIONS 10.1

1. Define Civil Law.
2. Define the term 'Constributory Negligence'.

## 10.2 CRIMINAL LAW- DEFINITION AND NATURE

Criminal Law is defined as "a body of rules that defines the conduct prohibited by the State for being harmful to public safety and welfare and also prescribes punishment to be imposed for the commission of such acts".

**More specifically, Criminal Law (also known as Penal Law)** deals with acts of intentional harm to individuals. In a larger sense, it can be said that it deals with offences against the State. Crime, in a Civilized Society, is considered to be a breach of duty, committed not only against a single individual, but also against the society at large. In other words, it is a breach of duty towards the public as a whole for which the offender is punished by the society or the State. A crime is a deliberate or reckless act that causes harm to another either to his/her person or to his/her property. Moreover, it is also a crime to neglect a duty to protect others from harm. Criminal Law refers to the body of laws which deal with crimes and their consequences.

In Criminal Law, an individual may report a crime but can never file a case against another individual, only the government can file the case against the offender. Criminal Law defines the various offences caused to human body and property and also prescribes punishments for them. The objective of Criminal Law is to punish the wrongdoer and to deter him/her from repeating the commission of the crime again. Crime and punishment are two sides of the same coin. Every act that endangers social harmony is a crime. In fact, crime is an act forbidden by law, and thus any person committing crime is liable to punishment.

The basic concept of Criminal Law is based on the maxim *"actus non facit reum, nisi mens sit rea"*, which means that an act itself does not constitute a crime, unless it is accompanied with a guilty intention. Thus, a crime cannot be committed unless it is accompanied with a guilty mind. Similarly, mere guilty mind also does not constitute a crime unless it is accompanied with a wrongful act. For example, if a person merely thinks of committing an act of kidnapping, he/she will not be called a kidnapper. This guilty intention must be accompanied

by the wrongful act of kidnapping to constitute the crime. Similarly, when somebody strikes another person, it is the crime of assault but the person will only be liable if the blow was intentional.

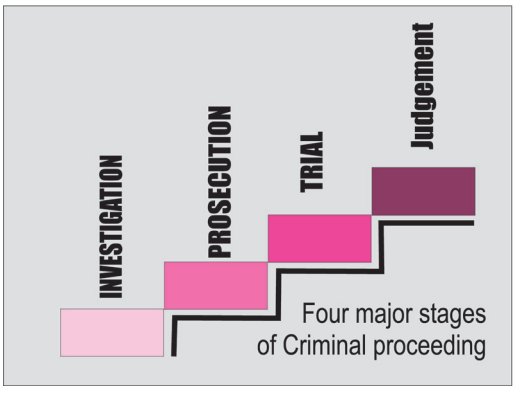
This clearly indicates that mental factor is the most important thing necessary to constitute a crime. Whenever a person accused of committing a crime is brought before the Court, first of all his or her mental condition is studied carefully to ascertain that whether he or she was aware of the fact that the act committed by him or her was wrongful. Thus, a person of unsound mind or an intoxicated person is considered to have done the wrongful act without any guilty intention and hence may not be punished.

Criminal Law deals mostly with two kinds of laws- the Substantive and the Procedural Laws. The Substantive Law prescribes the offences and the punishments for these offences, whereas the Procedural Law enshrines the procedures to be followed to inflict such punishments upon the wrongdoer.

The Criminal Law of India is codified in the Indian Penal Code, 1860, Criminal Procedure Code, 1973 and Indian Evidence Act, 1872. These are known as Major Criminal Acts. Besides these Criminal Acts, there are some other minor Criminal Acts also such as Narcotics and Psychotropic Substances Act, Arms Act, Drugs and Cosmetics Act, Dowry Prohibition Act, etc.

Indian Penal Code is the Substantive Law as it defines several offences and also lays down punishment for such offences. But the Criminal Procedure Code and the Indian Evidence Act are Procedural Laws, as the former deals with the rules of investigation of a crime, methods of conducting trials, provisions for appeal etc and the latter is concerned with the mode of proving whether a particular person has committed the offences or not.

As the nature of crime changes according to changing social and political scenario, various new laws are also enacted to tackle the situations. For example, crimes relating to terrorism are a comparatively recent phenomenon, which gives rise to a serious threat to the very foundation of human civilization. As no stringent provision under any law was there to tackle this crime, the Prevention of Terrorism Act (POTA), 2002 was passed to deal with the terrorist activities effectively, under which some of the crimes are even tagged with imprisonment for life or capital punishment. Subsequently, this law was repealed and replaced by the Unlawful Activities (Prevention) Amendment Act, 2004. The new Act has retained all the operational teeth of POTA, but has made only some cosmetic changes.



The word 'crime' has not been defined in the Indian Penal Code but anything which is injurious to public welfare is considered to be a crime.

### 10.2.1 The Indian Penal Code, 1860

The Indian Penal Code, 1860 is the Substantive Law consisting of 511 Sections which deal with specific offences and the corresponding punishments for those offences. It covers a vast range of offences, of which some are cognizable and others are non-cognizable. Cognizable means a police officer can arrest the offender without warrant, whereas non-cognizable means a police officer cannot arrest the offender without warrant. The Penal Code includes punishments for offences against the State, offences affecting society, offences affecting human body, property, reputation etc. it has also codified social offences like public equality, election, offences against public justice, religion etc.

For example, Sec.-141 describes what is an unlawful assembly, whereas Sec-143 prescribes the punishment for unlawful assembly. Similarly, Sec.300 of IPC deals with murder, whereas Sec.-302 deals with punishment for murder and so on and so forth.

### 10.2.2 The Criminal Procedure Code, 1973

The Criminal Procedure Code, 1973 deals with the procedures to be followed to inflict punishment upon the wrongdoer which includes procedures relating to investigation, enquiry, trial and finally the judgment. If the accused is found guilty, he/she will be punished, and if his guilt could not be proved beyond a reasonable doubt, he/she will be let free.

### 10.2.3 The Indian Evidence Act, 1872

The Indian Evidence Act, 1872 prescribes the various evidences to be taken into consideration while dealing with a case, whether civil or criminal. There are three main rules of the Law of Evidence- evidence must be confined to facts in issue; only relevant facts are to be admitted as evidence; hearsay evidence is no evidence and as such it is generally not to be admitted.

### 10.2.4 Principle of Joint Liability

The general principle of criminal liability is that a person who commits an offence is to be held guilty and is punished accordingly. But there are certain offences for which a person is made jointly liable with others for some reasons. The offence of joint liability is described under sections 34 to 38, 120A, 149, 396 and 460 of the Indian Penal Code. For example, every member of an unlawful assembly having a common object is responsible for acts committed by any other member of that assembly having that common object, and thus is made equally liable with that of the offender.

Notes

## INTEXT QUESTIONS 10.2

1. Define Criminal Law.
2. Define the 'principle of Joint Liability'.

## 10.3 THEORIES OF PUNISHMENT

### 10.3.1 Deterrent Theory

Deterrent theory of punishment is commensurate with the gravity or serious nature of the offence. As per this theory, punishment is given to an accused who has been found guilty of committing an offence with a view to warn other criminals that the same type of punishment will be given to them if they commit the same type of offences. The object of such punishment is to deter people from committing crimes. Severe punishment is given to persons committing serious offences. This theory of punishment is not very successful as most crimes are committed on the spur of the moment. For example, imposition of capital punishment on a person.

### 10.3.2 Preventive Theory

As per the preventive theory, punishment is given to the offender with a view to prevent the repetition of the offence by the offender by such punishments as imprisonment or death sentence. For example, punishment for restraint of child marriage.

### 10.3.3 Retributive theory

This type of punishment is based on the principle of retribution, i.e. life for life, eye for eye, tooth for tooth etc. it is a sort of barbaric punishment. Such type of punishment does not cure the disease scientifically and deals with criminality without studying causes of criminal tendencies or crimes.

### 10.3.4 Reformative theory

This theory aims at reforming the criminals so that they may be prevented from committing crimes again. Their attitude towards life is changed gradually and scientifically and they are gradually transformed into persons acceptable to the society. For example, the treatment of the juvenile offenders in the child care homes.

The commission of a crime consists of four stages- Intention, Preparation, Attempt, and Commission. A person can only be convicted if he or she has gone through all these four stages.

**Do you know**

There are certain acts which can be considered as offences even at the second stage of the crime, i.e., at the preparatory stage itself ? For example, preparation for committing dacoity or preparation for waging war against the government is punishable by law even though dacoity has actually not been committed or the war has not been waged.

If a wrongdoer says that he was ignorant of the consequences of the act done by him, he would not be excused. Because everybody is supposed to know the law of the land, which is guided by the maxim *'Ignorantia juris non excusat'* means ignorance of law is no excuse.

## ACTIVITY 10.1

Make a brief study on the following questions by gathering opinions of at least 5 of your classmates, friends, or family members:

1. Do you think imposition of capital punishment in rarest of the rare cases is proper?
2. Do you think punishing a person under Criminal Law will deter a person to commit further crime?

Mention their responses in the table given below and draw conclusions on the basis of those responses. What is your opinion regarding these issues?

| Questions | | | Responses of Persons | | |
|---|---|---|---|---|---|
| | Person 1 | Person 2 | Person 3 | Person 4 | Person 5 |
| Question 1 | | | | | |
| Question 2 | | | | | |

## INTEXT QUESTIONS 10.3

1. Mention different Theories of Punishment.
2. Explain 'Preventive Theory' of punishment.

## 10.4 RIGHTS COVERED UNDER CIVIL LAW AND CRIMINAL LAW

A Legal Right is an interest recognized and protected by law. An interest becomes a right only when it obtains a sanction behind it. Following four elements are the main components of a Legal Right:-

(i) The person in whom the right is vested is the owner of that right.

(ii) The person against whom this right exists, has the corresponding duties.

(iii) The act or forbearance which the person is entitled to get.

(iv) The subject matter of the right.

In order to be successful in an action under Civil Law, the 'plaintiff' has to prove that there has been a legal damage caused to him/her due to violation of his/her legal right. Unless there has been violation of a legal right, there can be no action under Civil Law even though the plaintiff has suffered any loss. This is explained by the maxim '*damnum sine injuria*'. On the other hand, if the plaintiff has suffered no loss and yet his/her legal right is violated, then such wrongful act is actionable and the plaintiff can be awarded compensation for that. This is explained by the maxim '*injuria sine damno*'.

Civil Law mostly includes rights covered under Law of Contract, Torts, Family Law and Law of Property–

### 10.4.1 Law of Contract

The Law of Contract is the most important branch of Mercantile law. Contracts are made to be performed but if either of the parties fails to perform his part of the contract, the aggrieved party can have the suitable remedy or remedies as mentioned in the Act.

Thousands of Contracts are made daily and therefore, the Indian Contract Act, 1872 is an Act of tremendous importance. All the rules regarding valid agreements are mentioned in the Act. The main object of the Act is to see that agreements made in everyday life in accordance with the Act are performed in the interest of the concerned parties and that in case of breach of contract the aggrieved party may have proper remedy in accordance with the Act through the Court of Law.

### 10.4.2 Law of Torts

The Law of Torts is a branch of the Law of obligations. It is that law, where you have the legal obligation to refrain from infecting harm to another and if harm is done, to repair it or compensate for it, are imposed not by agreement, but independently of agreement by force of the general law. Socially the function of 'Tort' is to shift loss sustained by one to the person who is deemed to have caused it or been responsible for its happening and in some measure to spread the loss over an enterprise or even the whole community. 'Tort' is that kind of 'Civil Wrong', which is not exclusively any other kind of 'Civil Wrong' like breach of contract or breach of trust. Thus it is said that all Torts are Civil Wrong, but all Civil Wrongs are not 'Torts'.

### 10.4.3 Family Law

India is a country with variety in culture and religions. Each religion is guided by its own personal law relating to marriage, divorce, maintenance, partition,

inheritance, succession etc. For example, the Hindus are guided by the Hindu Law, whereas the Muslims by the Mohammedan Law, the Parsies by the Parsi Law etc.

### 10.4.4 Property Law

Property Law deals with laws relating to transfer of both movable and immovable property. Whereas the Transfer of Property Act, 1882 prescribes the provisions for sale, lease, mortgage etc. of the immovable properties and also few provisions for transfer of movable properties, the Sale of Goods Act, 1930 prescribes provisions for transfer of only movable properties except actionable claim and money.

In comparison to Civil Law, Criminal Law covers the rights of a person on his own body and property. Whenever any crime is committed against the State or the body or property of a person, the State directly takes note of it and files a case against the wrongdoer.

## ACTIVITY 10.2

Write down in the boxes given below your legal rights and duties towards others in the society such as your family, neighbor and others.

**MY LEGAL DUTIES**

| Towards My Family | Towards My Neighbour | Towards Others |
|---|---|---|
| 1. | 1. | 1. |
| 2. | 2. | 2. |

**MY LEGAL RIGHTS**

| Towards My Family | Towards My Neighbour | Towards Others |
|---|---|---|
| 1. | 1. | 1. |
| 2. | 2. | 2. |

What are the differences between your Legal Duties and legal Rights? Do you think that there is any correlation between the two?

## INTEXT QUESTIONS 10.4

1. What do you mean by Legal Rights and Duties? Is there any correlation between the two?
2. Which of the following is 'true' and why?
   (i) Violation of a Legal Right without any actual loss to the plaintiff is actionable.

Notes

(ii) Loss suffered by the plaintiff without any violation of his legal right is actionable.

**3.** Which of the following rights are covered under the Civil Law?

(i) Rights of a person under a Contract

(ii) Voting rights

(iii) Right of a woman to get 'Maintenance' on 'Divorce'

## 10.5 DIFFERENCE BETWEEN CRIMINAL LAW AND CIVIL LAW

- Civil law deals with the disputes between individuals, organizations etc., whereas Criminal Law is the body of law that deals with crime and the legal punishment for criminal offenses.
- In Civil law, the initiation of a case starts with the filing of a complaint by the aggrieved party against the wrongdoer, whereas in Criminal Law, the case is filed by the Government against the accused.
- A Civil Litigation is less serious than a Criminal Litigation.
- Burden of proving the evidence in Civil Law lies on the plaintiff, whereas in Criminal Law it always lies on the State.
- In Civil Law, the punishment is given in terms of compensation whereby the wrongdoer reimburses the other party the amount of loss sustained by him as decided by the court, for example, in case of a breach of contract, the aggrieved party has to approach the court for damages, whereas in Criminal Law the guilty is punished by incarceration with or without fine, or in some rarest of the rare cases with death penalty.
- Broadly speaking, Civil Law aims at protecting individual interests against one another, whereas Criminal Law protects public interests against the wrongdoer.
- Civil Law includes disputes relating to property, contract, torts, family arrangements etc., whereas Criminal Law includes offences affecting human body and property and the corresponding punishments for those offences.
- In Criminal cases more evidence is needed to find the accused at fault than to find the 'defendant' at fault in civil ones.
- In Criminal Law, question of probability does not arise, it has to be always certain, and in contrast civil case can be proved on a balance of probabilities.

**Do you know**

There are some wrongful acts which come under Civil and Criminal Law both? For example, wrongful acts like assault, battery, defamation, negligence and nuisance find their places both under Civil and Criminal Law, though the definition of each of these wrongs may be different under both these laws. To make a person liable under civil law, the rules of torts will be applicable and for imposing criminal liability, the rules of Criminal Law will apply.

## INTEXT QUESTIONS 10.5

1. What are the basic differences between Civil Law and Criminal Law?
2. Which among the following cases are covered under Civil Law and which under Criminal Law?
   (i) Property dispute between two brothers
   (ii) 'Kidnapping' of a 15 years old girl
   (iii) Violation of a contractual term by one of the parties
   (iv) 'Murder' committed by a person
3. What is the importance of mental element in Criminal Law?

## WHAT YOU HAVE LEARNT

- Civil law and Criminal law are the two broad categories of law, those regulate the entire legal system by protecting the legal rights of the individuals as well as that of the State.
- Legal rights are nothing but the interests recognized and protected by law. Thus where there is an infringement of legal right of any person, he can get the relief by approaching the appropriate courts, i.e., in case of an act under civil law, the civil court and in case of a criminal act, the criminal court.
- Civil law mostly regulates individual or private rights, such as the rights covered under law of Contract, Torts, Family law etc., but criminal law regulates the conduct of the public to live in the society, as a crime is an offence against the State.
- Under civil law, Law of Contract deals with enforceable agreements between parties, their rights and obligations under the contract and remedies available for the breach of these contracts. Law of Torts deals with protection of legal rights of individuals in the society in case if its violation. Both of these laws

are mostly based upon the English Law System. The family law regulates the rights and duties of individuals under family arrangements, whereas the Hindu Law regulates the Hindus, the Muslims are guided by the Mohammedan Law, the Christians under the Christian Law, the Parsies by the Parsi Law and so on.

- Criminal law mostly deals with two kinds of laws- the substantive and the procedural laws. The substantive law prescribes the offences and the punishments for these offences, whereas the procedural law enshrines the procedures to be followed to inflict such punishments upon the wrongdoer.

## TERMINAL QUESTIONS

1. What do you mean by legal rights? What action can you take for violation of any of your legal rights?
2. Civil Law includes less serious offences than Criminal Law. Discuss.
3. Briefly enumerate the law that deals with contractual obligations.
4. All 'Torts' are 'civil wrongs' but all 'civil wrongs' are not 'Torts'. Explain
5. Explain the importance of the maxim *"Actus non facit reum nisi mens sit rea"* under Criminal Law.
6. Discuss the various Theories of punishment.
7. Read the following statements; identify the correct ones and rewrite the incorrect ones after making necessary corrections:
   (i) Where there is a right, there is a remedy.
   (ii) Civil Law deals with public rights.
   (iii) Under Criminal Law, punishment is given in terms of compensation.
   (iv) Capital punishment or death sentence is given in case of rarest of the rare crimes.
   (v) Litigations relating to property disputes are dealt under Criminal Law.
   (vi) In Civil Law, the case is filed by the Government against the accused.

## ANSWER TO INTEXT QUESTIONS

**10.1**

1. Civil Law is nothing but Law of the State or the Law of the Land. It is the area of Laws and Justice which affect individuals's legal status. Civil Law not only deals with the disputes between private parties, but also with the negligent acts of the individuals that cause harm to other.

The objective of Civil Law is to rectify the wrongs or to settle the disputes in an amicable manner rather than in a stringent way.

2. The 'Contributory Negligence' means such negligence to which the 'Plaintiff and also the 'defendant' contribute. The 'Plaintiff' and the 'defendant' are both responsible for such negligence.

## 10.2

1. Criminal Law is defined as "a body of Rules that defines the conduct prohibited by the state for being harmful to public safety and welfare and also prescribes punishment to be imposed for the commission of such acts. "Criminal Law refers to the body of Laws which deals with crimes and their consequences.
2. The general 'Principle of Joint Liability' is that a person who commits an offence is to be held guilty and is punished accordingly. But ther are certain offences for which a person is made jointly liable with others for some reasons.

## 10.3

1. The various theories of punishment are:
   (i) Deterrent Theory;
   (ii) Preventive Theory;
   (iii) Retributive Theory; and
   (iv) Reformative Theory
2. As per the Preventive Theory, punishment is given to the offender with a view to prevent the repetition of the offence by the offender by such punishments as imprisonment or death sentence.

## 10.4

1. Legal Rights are the interests recognized and protected by Law. An interest becomes a right if it obtains legal protection as well as legal recognition. Legal Rights are the interests, the violation of which amounts to moral wrong. Respect for the legal rights of others is the legal duty of an individual. When somebody violates his legal duty towards others, he is punishable by law. Yes, there is always a correlation between legal right and legal duty. Because when somebody has a legal right, that means all others in this world have the corresponding duty to obey that right otherwise law will take its own recourse against the wrongdoer.
2. Of the Two Questions, (i) is true and (ii) is false. Because for taking a successful action, the only thing which has to be proved is that the plaintiff's

Notes

legal right has been violated, whether any actual loss has been caused or not, that is immaterial.

3. All these three rights are covered under Civil Law.

## 10.5

1. Civil Law mostly regulates the private rights of individuals, organizations etc., which are of less serious nature and for which the punishment is given in terms of compensation, whereas Criminal Law protects the interests of the public against the acts of the wrongdoer of more serious nature and for this the offender is to be punished with imprisonment or with fine or both.
2. No (i) and (iii) are covered under Civil Law and No. (ii) and (iv) under Criminal Law.
3. 'Mental Element' is the most important factor in commission of a crime. Unless a crime is committed with guilty intention, it is not punishable.

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Notes

11

# SUBSTANTIVE LAW AND PROCEDURAL OR ADJECTIVE LAW

The Substantive and Procedural Laws are the two important branches of Law. The terms "Substantive" and "Adjective" seem to have been invented by Bentham in 1843. Austin criticized the distinction' saying "it cannot be made the basis of a just division.". Holland in his 'Treatise on Jurisprudence' popularized the terms "Substantive" and "Adjective" and that have been accepted by writers in general. In this lesson we will discuss the 'Juristic Approach' towards distinction between these two branches of law as both the laws are important and one could not be effective in the absence of other. Though there may be some overlapping between these two branches of Law. It is not an easy task to state with precision the exact nature of the distinction between the two. But it can be said that without laws of a Substantive Nature, Procedural Law would not have much to regulate, and in absence of Procedural Law, fair and consistent application of Substantive Law is not possible.

## OBJECTIVES

After studying this lesson you will be able to:

- explain the Juristic Approach towards distinction between Substantive and Procedural Law;
- understand the meaning and nature of Substantive Law;
- know meaning and nature of Procedural or Adjective Law;
- distinguish between Substantive and Procedural Law; and
- describe those Procedural and Substantive Rules/Principles which are equivalent.

## 11.1 PROCEDURAL LAW VIS A VIS SUBSTANTIVE LAW - JURISTIC APPROACH

**Bentham** has propounded that the 'Substance Law' and 'Procedural Law' can be clearly and sharply separated. He has stated that "By procedure, is meant the course taken for the execution of the laws **....** Laws prescribing, the course of procedure have on a former occasion been characterized by the term *Adjective* Laws. This is in contradiction to those other laws, the execution of which they have in view, and which for this same purpose have been characterized by the correspondent opposite term, *Substantive* Laws".

**Holland** in his book 'Treatise on Jurisprudence' has stated : "Law – defines the rights which it will aid, and specifies the way in which it will aid them. So far as it defines, thereby creating, 'Substantive Law.' So far as it provides a method of aiding and protecting, it is 'Adjective Law', or Procedure."

However **Salmond**, on the other hand, holds the view that separation "is sharply drawn in theory but in practical operation many procedural rules are "wholly or substantially equivalent to rules of Substantive Law". Salmond has noted that if one takes the view of the fact that 'the administration of justice in its typical form consist in the application of remedies to the violations of rights', this may mean that the Substantive Law is that which defines the rights, while Procedural Law determines the remedies. But this distinction between '*jus* and *remedium' (right and remedy)* is inadmissible as there are many rights (in the wide sense) which belong to the sphere of procedure; for example, a right of appeal, a right to give evidence on one's own behalf, a right to interrogate the other party, and so on. In the second place, rules defining the remedy may be as much a part of the Substantive Law as are those which define the right itself. The substantive part of the Criminal Law deals, not with crimes alone, but with punishments also. So, in the Civil Law, the rules as to the measure of damages pertain to the Substantive Law, no less than those declaring what 'damage' is actionable. Thus, to define procedure as concerned not with rights, but with remedies, is to confront the 'remedy' with the process by which it is made available.

Salmond has stated that 'The Law of Procedure may be defined as that branch of the law which governs the process of litigation. It is law of action. The entire residue is Substantive Law, and relates, not to the process of litigation, but to its purposes and subject-matter…. Substantive Law is concerned with the ends which the administration of justice seeks. It determines their conduct and relations in respect of the matters litigated. Procedural Law deals with the means and instruments by which those ends are to be attained. It regulates the conduct and relations of courts and litigants in respect of the litigation itself'. Further he pointed that "Procedural Law is concerned with affairs inside the courts of justice" while "Substantive Law deals with matters in the world outside."

Another juristic view is that there is no distinction between "Substance" and "Procedure". "The distinction between Substantive and Procedural Law is artificial and illusory. In essence, there is none. The remedy and the predetermined machinery, so far as the litigant has **a** recognized claim to use it, are, legally speaking, part of the right itself.

Professor **Cook** in, *"Substance" and "Procedure" in the Conflict of Laws* had arrived at a tri- chotomy. There are: (i) "substance," (ii) "procedure," and (iii) apenumbra, a "twilight zone," a "no-man's land," which may be "substance "or "procedure" conditioned on the end to be attained.

## INTEXT QUESTIONS 11.1

**Write True/False.**

1. "The distinction between Substantive Law and Procedural Law is artificial and illusory". (True/False)
2. "The Separation between Substantive Law and Procedural Law is sharply drawn in theory but in practical operation many procedural rules are wholly or substantially equivalent to rules of Substantive Law" Salmond. (True/False)

## 11.2 MEANING AND NATURE OF SUBSTANTIVE LAW

Let us now discuss the meaning and nature of Substantive Law and Procedural Law and also look into the areas that falls into the domains of both Laws.

The Substantive Laws are basically derived from Common, Statutory, Constitution and from the Principles found in judicial decisions following the legal precedents to cases with similar facts and situations. With the passage of time and creation of new Statutes, the volume of Substantive Law has increased. **For Example**:- Penal Law, Law of Contract, Law of Property, Specific Relief Act, etc are Substantive Law.

It can be concluded out from writings of various professional texts that Substantive Law deals with the legal relationship between subjects (individuals) or the subject and the State. Substantive Law is a Statutory Law that defines and determines the rights and obligations of the citizens to be protected by law; defines the crime or wrong and also their remedies; determines the facts that constitute a wrong -i.e. the subject-matter of litigation in the context of administration of justice. The Substantive Law, defines the 'remedy' and the right; includes all categories of Public and Private Law and also includes both Substantive Civil and Criminal Law.

In short, it can be said that Substantive Law is a Statutory Law that deals with the relationship between the people and the State. Therefore, Substantive Law defines the rights and the duties of the people. Substantive Law deals with the structure and facts of the case; defines the rights and duties of the citizens and can not be applied in non-legal contexts.

### 11.2.1Substantative Civil Law

The Civil Law includes any private wrong, a 'Tort', which unfairly causes someone else to suffer loss or harm resulting in legal liability for the person who commits the tortious act. Substantative Law defines to charge the 'Tort'. Substantative Civil Law also includes the Law of Contract- defines what is essential elements required for formation of contract; real property. The Indian Succession Act, 1925 deals with Substantative Law of testamentary succession in regard to persons other than Muslims and intestate succession in regard to persons other than Hindu and Muslims in India. Other Acts that provides for Substantive Civil Law in India are *Indian Contract Act*, 1872; *Transfer of Property Act* 1882*;* Specific Relief Act; Indian Trust Act, 1882.

### 11.2.2 Substantive Criminal Law

The Indian Penal Code (IPC) in India defines various penal offences and lists the elements that must be proved to convict a person of a crime. It also provides for punishment applicable to these offences. For example Substantive Criminal Law defines what constitutes 'Murder', 'Robbery', 'Rape', 'Assault' etc.

## INTEXT QUESTIONS 11.2

1. List the various Sources of Substantive Law.
2. Define Substantative Civil Law

## 11.3 MEANING AND NATURE OF PROCEDURAL LAW

Procedural Law (or Adjective Law) deals with the enforcement of law that is guided and regulated by the practice, procedure and machinery. This law is very important in administration of justice. Procedural law functions as the means by which society implements its substantive goals. Procedural law is derived from constitutional law, Statutes enacted by legislature, law enforcement agencies promulgating written regulations for their employees, which may not have the force of law but their violation may result in internal sanctions; and the rules and procedural guidelines laid down by the Supreme Court. According to Holland, Adjective law, though concerns primarily with the rights and acts of private litigants, touches closely on topics, such as the organization of Courts

and the duties of judges and sheriffs, which belong to public law. It comprises of (i) jurisdiction (in the conflicts sense); (ii) jurisdiction (domestic sense) **;** (iii) the action, including summons, pleadings, trial(including evidence); (iv) judgment; (v) appeal; (vi) execution.

Procedural Law is that law which prescribes method of enforcing rights or obtaining redress for their invasion; machinery for carrying on a Suit.

The Code of Civil Procedure, 1908; Code of Criminal Procedure, 1973;Indian Evidence Act, 1872; Limitation Act, 1963; The Court Fees Act 1870; The Suits Valuation Act, 1887 are examples of Procedural Law in India.

The Procedural Law can be said, is a law that:

- Lays down the rules with the help of which law is enforced.
- Relates to process of litigation and determines- what facts constitute proof of a 'wrong' or 'Tort'.
- In the context of administration of justice -the law of procedure defines the modes and conditions of the application of remedies to violated rights.
- Are the adjective rules, prescribing the mode in which the State, as such a personality, may sue or be sued.
- Provides for mechanism for: obtaining evidence by police and judges, conduct of searches, arrests, bail, and presentation of evidence at trial and process of sentencing.
- It is the law of action that includes all legal proceedings, civil or criminal.

### 11.3.1 Law of Civil Procedure

Civil Procedural Law consists of the rules and standards which courts follows while conduct civil trials. These rules govern how a civil suit or case may be commenced, what kind of service of process (if any) is required, the types of pleadings or statements of case, motions or applications, and orders allowed in civil cases, the timing and manner of depositions and discovery or disclosure, the conduct of trials, the process for judgment, various available remedies, and how the courts and clerks must function. Civil actions concern with the judicial resolution of claims by private individual or group, companies or organisations against another and in addition, governments (or their subdivisions or agencies) may also be parties to civil actions. In India Code of Civil Procedure, 1908 consolidates and amend the laws relating to the procedure of the Courts of Civil Judicature.

### 11.3.2 Law of Criminal Procedure

Law relating to criminal, Procedure provides or regulates the steps by which one that violate a criminal Statute is punished. Procedural Criminal Law can

be divided into two parts, the investigatory and the adjudicatory stages. In the investigatory phase, investigation primarily consists of ascertaining of facts and circumstances of the case by police officers and arrest of suspect of criminal offence. The adjudicatory phase begins when with the trial of suspect for the alleged criminal conduct in the court of Law. In India Criminal Procedure Code, provides the procedure of getting the penal offences prosecuted and punished by the criminal courts. It also lays down the details regarding the arrest, investigation, bail, jurisdiction, appeals, and revisions and compounding of offence etc with regards to the various offences.

## INTEXT QUESTIONS 11.3

1. Define Procedural Law.
2. Give examples of Civil Procedural Law in India.
3. Give examples of Criminal Procedural Law in India.
4. List the various Sources of Procedural Law.

**Do you know**

Adjective/Procedural Law is not less than Substantive Law and may also be normal or abnormal (i.e. artificial persons, and such varieties of natural persons who are in a different position with reference to suing and being sued from that occupied by ordinary individuals-e.g. lunatics, minors)

## 11.4 DISTINCTION BETWEEN SUBSTANTIVE AND PROCEDURAL LAW

Procedural Law is always subservient to the Substantive Law. Nothing can be given by a procedural law what is not sought to be given by a Substantive Law and nothing can be taken away by the Procedural Law what is given by Substantive Law.

**Comparison between Substantive Law and Procedural Law**

| Substantive law | Procedural Law |
|---|---|
| The Substantive law defines and determines the obligations and rights of people and legal entities | Procedural law lays down the method of aiding, the steps and procedures for enforcement of Law- Civil and Criminal. |

| | |
|---|---|
| When a particular law defines rights or crimes or any status, it is called Substantive Law. It defines how a crime or tort will be charged and how the evidence and case facts will be presented and handled.EX: The definition of 'manslaughter' is substantive | The laws that determine how the rights of the plaintiff and defendant will be protected and enforced throughout the course of the case Procedural Laws. It includes procedure, pleading, and evidence.Ex: The right to a speedy trial for a person accused of 'manslaughter' is procedural. |
| A Substantive Law also provides for Prohibitions administered by courts which behaviors are to be allowed and which are prohibited- such as law providing prohibition against murder or the sale of narcotics. | Procedural Laws provides rules to determine, how the Substantive Laws are to be administered, enforced, changed, and used in the mediation of disputes -such as filing charges or presenting evidence in court. |

Let us now see some examples illustrating distinction between Substantive Law and Procedural Law.

- A Right of appeal is a Substantive and is creature of the Statute. Rules of Limitation pertain to the domain of Adjective Law.
- Right to recover certain property is a question of Substantive Law ( for the determination and the protection of such rights are among the ends of the administration of justice); but in what courts and within what time the person may institute proceedings are questions of Procedural Law ( for they relate merely to the modes in which the courts fulfil their functions).
- So far as the administration of justice is concerned with the application of remedies to violated rights, the Substantive Law defines the 'remedy' and the right, while the Law of Procedure defines the modes and conditions of the application of the one to the other.
- The law that to possess 'cocaine' is crime in Substantative Law . Criminal Procedure sets the rules for discovering and adjudicating violations of that criminal statute — for example, police may not subject suspects to unreasonable searches and seizures, or coerce confessions. If the police violate these or other procedural rules, various procedural consequences may arise, such as exclusion of evidence at trial or dismissal of the charge.
- Whether an offence is punishable by fine or by imprisonment is a question of Substantive Law. But whether an offence is punishable summarily or only on indictment is a question of procedure and is, therefore, a question of Procedural Law.

## INTEXT QUESTIONS 11.4

**Write True/False.**

1. The Substantive Law defines and determines the obligations and rights of people and legal entities. (True/False)
2. The Procedural Law lays down the Method of aiding, the steps and procedures for the enforcement of Law – Civil and Criminal. (True/False)

## 11.5 SUBSTANTATIVE AND PROCEDURAL LAWS – RETROSPECTIVE OR PROSPECTIVE

In general, all Procedural Laws are retrospective unless a legislature specifies so.

*In 'Nani Gopal Mitra v. State of Bihar' (AIR 1970 SC 1636)*, the Court declared that amendments relating to procedure operated retrospectively subject to the exception that whatever be the procedure which was correctly adopted and proceedings concluded under the old law the same cannot be reopened for the purpose of applying the new procedure.

*In 'Hitendra Vishnu Thakur and others etc. etc. v. State of Maharashtra and others (1994) 4 SCC 602-* the Court summed up the legal position with regard to the Procedural Law being retrospective in its operation and the right of a litigant to claim that he/she be tried by a particular Court, in the following words:

(i) A Statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to form and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature. (iii) Every litigant has a vested right in Substantive Law but no such right exists in Procedural Law.

(iv) A Procedural Statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A Statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

*In Rajasthan State Road Transport Corporation and Anr. v. Bal Mukund Bairwa' (2009) 4 SCC* 299 the Court relied upon the observations made by Justice Benjamin N. Cardozo in his famous compilation of lectures The Nature of Judicial Process – that " in the vast majority of cases, a judgment would be retrospective. It is only where the hardships are too great that retrospective operation is withheld."

## INTEXT QUESTIONS 11.5

**Write True/False.**

1. In general, all Laws are retrospective unless a legislation specifies so. (True/False)
2. Both– Public and Private Law may be 'Substantive Law or Procedural Law'. (True/False)

**Do you know**

Both Public and Private Law may be Substantive Law or Procedural Law. The distinction between the Substantive and Procedural Law is not an always easy and clear-cut. The same law may be Procedural as well as Substantive. For Example: Evidence Act, 1872.

## 11.6 EQUIVALENT- PROCEDURAL AND SUBSTANTIVE RULES/PRINCIPLES

According to Salmond**,** although the distinction between Substantive Law and Procedural Law is sharply drawn in theory, there are many rules of procedure which, in their practical operation, are wholly or substantially equivalent to rules of Substantive Law. Of these equivalent Procedural and Substantive principles there are at least three classes as discussed below:

1. An exclusive evidential fact is practically equivalent to a constituent element in the title of the right to be proved. e.g. the Rule of Evidence that a Contract can be proved only by writing corresponds to a Rule of Substantive Law that a Contract is void unless reduced to writing.
2. Conclusive evidential fact is equivalent to and tends to take the place of the fact proved by it. For example:
   - A child under the age of eight years is incapable of criminal intention is a rule of evidence, but differs only in form from the substantive rule that no child under that age is punishable for a crime.

- The acts of a servant done about his master's business are done with his master's authority is a conclusive presumption of law, and pertains to procedure; but it is the forerunner and equivalent of our modern substantive law of employer's liability.
- A 'Bond' (that is to say, an admission of indebtedness under seal) was originally operative as being conclusive proof of the existence of the debt so acknowledged; but it is now itself creative of a debt; for it has passed from the domain of procedure into that of Substantive Law.

3. The limitation of actions is the procedural equivalent of the prescription of rights. The former is the operation of time in severing the bond between right and remedy; the latter is the operation of time in destroying the right.

## INTEXT QUESTIONS 11.6

**Write True/False.**

1. An exclusive evidential fact is practically equivalent to a constituent element in the title of the right to be proved. (True/False)
2. Conclusive evidential fact is equivalent to and tends to take the place of the fact proved by it. (True/False)

## WHAT YOU HAVE LEARNT

The Substantive and Procedural laws are the two important branches of Law. The Substantive Law is a Statutory law that defines and determines the rights and obligations of the citizen to be protected by law. Procedural Law or Adjective Law deals with the enforcement of Law that is guided and regulated by the practice, procedure and machinery.

Substantative Law also defines the crime or 'wrong' and also their 'remedies'; determines the facts that constitute a wrong -i.e. the subject-matter of litigation; in the context of administration of justice. the substantive law defines the remedy and the right; includes all categories of Public and Private Law. It includes both Substantive Civil and Criminal Law.

Procedural Law lays down the rules with the help of which law is enforced; determines what facts constitute proof of a wrong; in the context of administration of justice –The Procedural Law defines the modes and conditions of the application of remedies to violated rights; provides for mechanism for obtaining evidence by police and judges, conduct of searches, arrests, bail, and presentation of evidence at trial and process of sentencing. It is the law of action that includes all legal proceedings, Civil or Criminal.

Although the distinction between Substantive Law and Procedure is sharply drawn in theory, there are many rules of procedure which, in their practical operation, are wholly or substantially equivalent to rules of Substantive Law. e.g. Evidence Law (Evidence Act, 1872).

A Statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a Statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

## TERMINAL QUESTIONS

1. Define 'Substantive Law'.
2. Define 'Procedural Law' or Adjective Law.
3. Distinguish between Substantive Law and Procedural or Adjective Law with the help of Examples.
4. Describe those Rules/Principles, where the Procedural Law and Substantive Law may be same.
5. Discuss whether the Substantive Law and Procedural Law are retrospective or prospective in nature.

## ANSWER TO INTEXT QUESTIONS

### 11.1

1. True
2. True

### 11.2

1. The Substantive Laws are basically derived from Common Law, Statutory Law, Constitution and from the Legal Precedents.
2. Substantive Law is a Statutory Law that deals with the relationship between the people and the State. Substantive Law defines the rights and the duties of teh people. The Substantative Civil Law can be defined as a Law which includes any private wrong, which unfairly causes someone else to suffer loss or harm resulting in legal liability.

## 11.3

1. Procedural Law is that Law which prescribes methods of enforcing rights or obtaining redress for their invasion; machinery for carrying on a suit. Procedural Law deals with the enforcement of Law that is guided and regulated by practice, procedure and Machinery. This law is very important in the administration of Justice.
2. The Code of Civil Procedure, 1908; Code of Criminal Procedure, 1973;Indian Evidence Act, 1872; Limitation Act, 1963; The Court Fees Act 1870; The Suits Valuation Act 1887 are examples of Procedural Law in India.
3. In India, The Criminal Procedure Code 1973, provides the procedure for punishing the penal offences.
4. The various sources of Procedural Law are (i) Constitutional Law (ii) Statutes enacted by Legislature (iii) Rules the Supreme Court and (iv) Written Regulations promulgated by Law Enforcement Agencies for their employees.

## 11.4

1. True
2. True

## 11.5

1. True
2. True

## 11.6

1. True
2. True

12

# PUBLIC LAW AND PRIVATE LAW

In any legal system the juristic principles are evolved in the context of rights and the law as command regulates the relationship between individuals and also the relationship between individual and the government. The Private Law of Contract and obligations plays an important role in shaping the socio-economic conditions different from the sphere of Public Law. In his introduction to 'Holland on jurisprudence', *N R Madhav Menon* has pointed out that as per Holland, the State's presence in the sphere of Private Law is only as arbiter of the rights and duties which exists between the citizens. In Public Law, the State is not only the arbiter, but is also one of the parties interested. The rights and duties with which it deals concern itself of the one part and its subjects on the other part, and this union in one personality of the attributes of judge and party, has given rise to the view that the State (Sovereign) not only has no duties, but also has no rights properly so called. Of the two persons who are the constituent elements of every right, one must always be the State, acting, of course, through its various functionaries. The Private Law is continuously evolving. The growth in technology has added new dimensions to the concept and the distinction between Public and Private law, both in their Substantive and Procedural aspects, may be inadequate to comprehend these changes. Today the public-private classification is breaking down and the theory of State as the arbiter of all disputes is being questioned. In fact, many disputes today are against the State and its functionaries. Independent Judiciary has become the key element of rule of law necessitating the need to re-write jurisprudence originally articulated from the point of view of the Sovereign State.

## OBJECTIVES

After studying this lesson, you will be able to:

- explain the meaning and nature of Public Law;
- explain the meaning and nature of Private Law;
- understand the concept of Constitutional Law;
- discuss the concept of Administrative Law;

- define Criminal Law;
- list the differences between Public and Private Law; and
- discuss the role of Judges in shaping Law

Notes

## 12.1 MEANING AND NATURE OF PUBLIC LAW

Public Law is that part of law, which governs relationship between the State (government/government agencies) with its subject and also the relationship between individuals directly concerning the society. According to Loughlin, 'Public law is a form of political jurisprudence that incorporates no transcendental or metaphysical ideas of justice and goodness; it is concerned solely with those precepts of conduct that have evolved through political practice to ensure the maintenance of the public realm as an autonomous entity.'

The Public Law deals with the social problems in the broad context and may include the following heads: Constitutional Law, Administrative Law, Criminal Law and Criminal Procedure, Law of the State considered in its quasi private personality, Procedure relating to the State as so considered and Judge made Law.

In short, Public Law governs relationship between the State with its citizens and also relationship between individuals directly concerning the Society. Constitutional Law, Administrative Law, Criminal Law and Criminal Procedure are the subject matter of Public Law.

### 12.1.1 Constitutional Law

The primary function of Constitutional Law is to ascertain the political center of gravity of any given State postulating the supremacy of law in the functioning of State. In India, the Constitution makes India: Sovereign, Socialist, Secular, Democratic, Republic with a Federal System with Parliamentary form of Government in the Union and the States; and with an Independent Judiciary. It also establishes the structure, procedures, powers and duties of the government and spells out basic human rights which are fundamental in the governance of Nation in the form of Fundamental Rights and Directive Principles of State Policy.

Constitutional Law is a branch of Public Law. It determines the political organization of the State and its powers, while also setting certain substantive and procedural limitations on the exercise of governing power. Constitutional Law consists of the application of fundamental principles of law based on the document, as interpreted by the Supreme Court. In the words of Salmond, "Constitutional Law is the body of those legal principles which determine the

Constitution of a State- i.e., the essential and fundamental portions of the State's organization."

### 12.1.2 Administrative Law

As per *Holland*, Administrative Law provides for the manner of activities or the various organs of the Sovereign Power as provided by the Constitution. In this sense Administration has been defined as 'the exercise of political powers within the limits of the Constitution as the total concrete and manifoldly changing activity of the State in particular cases as the functions, or the activity, of the Sovereign Power'. It may fairly be said to include the making and promulgation of laws; the action of the government in guiding the State in its foreign relations; the administration of justice; the management of the property and business transactions of the State; and the working in detail, by means of subordinates entrusted with a certain amount of discretion, of the complex machinery by which the State provides at once for its own existence and for the general welfare. It deals, with the collection of the revenue, the collection of statistic, international trade, manufacturing, pollution, taxation, and the like. This is sometimes seen as a sub-category of Civil Law and sometimes seen as Public Law as it deals with regulation and public institutions. The Administrative Laws are enforced by the executive branch of a Government rather than the judicial or legislative branches (if they are different in that particular jurisdiction). According to *Vago Steven*, "Administrative Law is a body of the law created by administrative agencies in the form of regulations, orders, and decisions."

### 12.1.3 Criminal Law

The most important of the functions of the State is that which it discharges as the guardian of order; preventing and punishing all injuries to itself, and all disobedience to the rules which it has laid down for the common welfare. In defining the orbit of its rights in this respect, the State usually proceeds by an enumeration of the acts which infringe upon them, coupled with an intimation of the penalty to which any one committing such acts will be liable. The branch of law which contains the rules about this subject is accordingly described as 'Criminal law'. Criminal Law denotes wrongs against the State, community, and public. Adjective Criminal Law,' Penal Procedure,' Instruction Criminology,' is the body of rules whereby the machinery of the Courts is set in motion for the punishment of offenders.

'Criminal Law is concerned with the definition of crime and the prosecution and penal treatment of offenders'. Although a criminal act may cause harm to some individual, crimes are regarded as offenses against the State or "the people." A 'crime' is a "public" as opposed to an "individual" or "private" wrong. It is the State, not the harmed individual that takes action against the offender.

Notes

## INTEXT QUESTIONS 12.1

1. Explain briefly Constitutional Law.
2. Define 'Criminal Law'?
3. What do you understand by 'Administrative Law'?
4. Define Public Law.

## 12.2 MEANING OF PRIVATE LAW

Private Law is concerned with the relationship between individuals with one another or private relationship between citizens and companies that are not of public importance. In the case of Private Law the role of the State is merely to recognize and enforce the relevant law and to adjudicate the matters in dispute between them through its judicial organs. Private Law as per Holland is substantive and defines the rights of individuals or it may be adjective indicating the procedure by which rights are to be enforced or protected.

In simple words Private Law governs the relations of citizens with each other. Law of Torts, Law of Contract, Private and Intellectual Property Rights are the subject matters of Private Law.

### 12.2.1 Private Substantive Law

The study of Private Law commences with the consideration of the Substantive Law of the various species as follows:

1. Normal Substantative Rights are the Antecedent Rights. The antecedent rights may be 'in rem' or 'in personam'. The antecedent rights 'in rem' are rights which, irrespectively of any wrong having been committed, are available for the benefit of the person of inherence against a person of incidence so unlimited so as to comprise the whole world. Example: right to personal freedom, reputation, possession and ownership.

   The rights 'in personam' are those available rights against a definite person and may arise out of agreement of the parties or by virtue of duty casted by law. Example: right of one member of family against another, right of person for action against surgeon for want of skill.

   **Illustration:** 'X' has land. He/she enters in to contract with gardener to maintain his/her land for one year. Here general duty is on the whole world not to trespass on land of 'X'. The gardener, however, owes special duty to 'X' over and above the duty owed to him/her by the entire world.

   Normal substantive rights may also be 'Remedial' –the objective of the right is either restitution or compensation. Remedial Rights as a rule are available in personam against the wrongdoer.

2. Abnormal Antecedent Rights–abnormal can be natural individual human beings (minors infants, lunatics convict) or artificial i.e. aggregate of human beings or of persons property which are treated by law as individual human being (associations, foundation, corporation).

### 12.2.2 Private Adjective Law

The Substantive Law affecting the State as a quasi-private juristic personality is supplemented by a body of adjective rules, prescribing the mode in which the State, as such a personality, may sue or be sued. Adjective Law, no less than Substantive Law may be normal or abnormal and the position with respect to artificial persons and such varieties of natural persons as pointed above are different with reference to suing and being sued from that occupied by ordinary individuals.

According to Bernard Rudden Private Law deals with the legal relations between persons. It covers matters of pure status (marriage, divorce, kinship and so on); matters involving assets of some sort (property, succession, contracts); and commercial activities in the wider sense. Its essential feature is that the participants are presumed to be juridically equals (unlike the public law structure where relations are hierarchical) so that one cannot give orders to another, unless so authorised under some previous contractual or family arrangement. Its essential technique is that much of it is not automatically binding (*jus cogens* in lawyers' language) but serves to cut down the cost of legal transactions by providing a set of patterns which citizens may use if they wish. For instance the intestacy rules operate only if a person dies without having made a will. The rules on sale, lease, loan, partnership and so on are there as models which can be adopted in full or modified if the parties so desire. Despite the many differences on the surface and in particular detailed rules, the overall structure of Private Law in both Civil and Common-Law Systems can be stated quite simply in a formula derived ultimately from the Roman jurists: Private Law deals with persons, property, obligations and liability.

Thus, it can be said that Private Law includes (i) Law of obligations /Law of Contract (organizes and regulates legal relations between individuals under contract) (ii) Law of Tort (addresses and remedies issues for civil wrongs, not arising from any contractual obligation). (iii) Law of Property (iv) Law of Succession, (v) Family Laws- family rights against abduction and adultery.

### INTEXT QUESTIONS 12.2

1. Define Private Law.
2. Distinguish between antecedent right 'in rem' with right 'in personam'.
3. What is 'Private Adjective Law'?

## 12.3 DISTINCTION BETWEEN PUBLIC AND PRIVATE LAW

To determine the conception of Public, as opposed to Private, Law dates back to the Romans, who say of it *'ad statum rei Romanae spectat,' 'in sacris, in*

*sacerdotibus, in magistratibus consistit'* and, as a matter of fact also includes the law of crime. The distinction between Public and Private Law was also followed in countries of civil law traditions, common law countries.

**Do you know**

The distinction between Public and Private Law is a purely academic debate, nevertheless, it also affects legal practice. There are areas of law, which may not fit into distinction of Public or Private Law e.g. employment law –the employment contract is in nature of Private Law and other activities, where an employment inspector investigates workplace safety falls under Public Law

### 12.3.1 Theories to determine distinction between Public Law and Private Law.

Several Theories have been evolved to determine the nature of the distinction between Public Law and Private Law. Let us discuss some theories which distinguish between public and private law

The **'Interest Theory'** has been developed by the Roman jurist Ulpian: "*Publicum ius est, quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem.* Public law is that, which concerns Roman State, Private Law is concerned with the interests of citizens. The weak point of this theory is how to define public interest as many issues of private law may also affect the public interest.

The **'Subordinate Theory'** differentiates according to the relationship between the participants. Public law is characterized by a superior-subordinate relationship, whereas private law creates a relationship of coordination. Therefore, Public Law is prominent for unilateral binding regulations such as statues and administrative acts and private law for contracts. This theory has been developed in the last century based on the idea of administration being restricted to executory administration. It clearly fails to explain relationship in the area of public service administration.

The **'Subject Theory'** is concerned with the position of the subject of law in the legal relationship, to which the rights and duties are assigned. If it finds itself in a particular situation, as a public person (the holders of Sovereign Authority such as a State or a Municipality), the public law applies, otherwise it is private law authorizing or obliging everyone.

A combination of above theories can provide a workable distinction. We can now say that a field of law is considered Public Law or Private Law on the basis of public interest, endowment of the power and the relation to the State.

### 12.3.2 Public Vs Private Law

| Public law | Private law |
|---|---|
| It deals more with issues that affect the general public (may be individual, citizen or corporation) or the State itself. | It focuses more on issues affecting private individuals, or corporations. |
| The persons concerned in a Public Law, right are, therefore, necessarily dissimilar, one of them being always that highly abnormal person which is called a State. | Both of the persons concerned in Private Law, rights are as a rule, perfectly similar, and of that normal type which requires no special investigation. |
| It may also be remarked that the majority of the rights dealt with in Public Law are permanently enjoyed by the State as the person of inherence against its subjects as the persons of incidence. | In Private Law on the contrary, he/she who is today the person of inherence with reference to a right of any given description may very probably become tomorrow the person of incidence with reference to a precisely similar right and *vice versa).* |
| In Public law the State is not only arbiter, but is also one of the parties interested. The rights and duties with which it deals concern itself of the one part and its subjects of the other part. | In Private law the State is indeed present, but it is present only as arbiter of the rights and duties which exist between one of its subjects and another. |
| Public Law is concerned with the structure of government, the duties and powers of officials, and the relationship between the individual and the State. "It includes such subjects as Constitutional Law, Administrative Law, regulation of public utilities, Criminal Law and Procedure, and Law relating to the proprietary powers of the State and its political subdivisions" | Private Law is concerned with both substantive and procedural rules governing relationship between individuals (such as the law of torts or private injuries, contracts, property, wills, inheritance, marriage, divorce, adoption, and the like). |

## ACTIVITY 12.1

Write down in the boxes given below any two differences between Public and Private law.

Notes

## INTEXT QUESTIONS 12.3

1. List the Theories which have been evolved to determine the nature of distinction between Public Law and Private Law.
2. What is Interest Theory?

## 12.4 ROLE OF JUDGES IN SHAPING LAW

The Common Law is generally uncodified with no comprehensive compilation of Legal Rules and Statutes. Though the Common Law does rely on some scattered Statutes, which are legislative decisions, it is largely based on 'Precedent', meaning the judicial decisions that have already been made in similar cases. The 'precedents' to be applied in the decision of each new case are determined by the presiding judge. As a result, judges have an enormous role in shaping American and British law.

Bernard Rudden has noted that the main creator of the Common Law is the Judiciary. However, in Civil Law Systems (codified), at least until very recently, judges played the comparatively minor role of settling the dispute in front of them. In countries of the Civil Law group, these three areas of status, assets, and business may be dealt with in separate codes of Family Law, Civil Law (using the word in a narrower sense) and Commercial Law. In the Common Law world the basic system is laid down by case law, although there are many modern Statutes which often re-state and systematize the work of the judges. The **'doctrine of precedent'** is an operating rule of a Common Law System so the rule itself was never laid down by a legislator. It is a judicial creation and can be amended or adapted by its makers. In England, for instance, the highest court (the House of Lords) held in the 19th century that it was bound by the law laid down in its own prior decisions and in the 1960 it amended rule, and gave notice that it was now free, to change its mind. Lower Courts, however, are bound by the highest Court's rulings on matters of law.

Speaking on the role of the judges, President Roosevelt in his message of 8 December, 1908 to the Congress of the United States, said: "The chief law-makers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process or law, liberty, they necessarily enact into law parts of the system of social philosophy; and as such interpretation is fundamental, they give direction to all law making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the

peaceful progress of our people during the twentieth century, we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy which was itself the product of primitive economic conditions."

Prof. A. V. Dicey was of the view that the Courts must act as judges, not as arbitrators, and that the duty of a Court is to follow 'Precedents' though to a limited extent is admitted in all civilised countries have obtained more complete acceptance in England than in any Continent, and perhaps in any other existing, State. According to Dicey, the judge made law is real law, though made under the form of, and often described, by judges no less than by jurists, as the mere interpretation of law. There are, however, certain limitations of the Judges/ Courts: (a) It cannot openly declare a new principle of law: it must always take the form of a deduction from some legal principle whereof the validity is admitted, or of the application or interpretation of some statutory enactment (b) It cannot override Statute Law (c) the Courts may, by a process of interpretation, indirectly limit or possibly extend the operation of a Statute, but they cannot set a Statute aside. It cannot, by its very nature, override any established principle of judge-made law. A superior Court may, of course, overrule any principle of law that derives its authority merely from the decisions of an inferior Court.

Hart accepts that in 'hard cases' judges make law since in arriving at decisions, judges have a fairly wide discretion by virtue of the rule of recognition: if there is some 'acid test' by which judges are to able to decide what are the valid legal rules, then where there is no applicable legal rule or the rule or rules are uncertain or ambiguous, the judge must have a strong discretion to 'fill in the gaps' in such 'hard cases.' Judges are nonetheless guided by various sources but ultimately they base their decision on subjective conceptions of fairness and justice. Sometimes there is no source (rule or precedent) to guide the judge and he/she must use strong discretion and legislate.

According to T. R.S. Allan, Rule of Law purports to be a principle implicit in all Common Law Legal System that judges may invoke to strike down government, and even legislative, action. Allan was of the view that the Rule of Law is a legal principle; a substantive legal rule which is, or should be, applied by Commonwealth Courts and to be understood through examination of case law.

On the other hand Tomkins is of view that the role of the Courts is merely to police the boundaries set by Parliament. Scrutiny of the rationality of Executive decision-making should be left to the Commons. Further, T. Poole claims that 'judicial review' by judges cannot legitimately replace political debate in legislatures as the principle forum for debates about policy. Legislatures are

better placed than courts to accommodate a wide range of different points of view and different interests. And, we could add, only legislatures can produce systematic solutions to social problems – the judicial process ordinarily only allows for slow, incremental, changes to the law.

However, here we will not go into debate whether judges are creators of law or not, but certainly they can play an important role in shaping law. In India, there are some classic examples where the judgments of the courts have resulted in to making of law. *in* '*Vishaka* Vs. State of Rajasthan', the Supreme Court laid down guidelines and norms against sexual harassment at workplace and recognized sexual harassment as a violation of fundamental rights of women to equality. The Court stressed that this should operate as a binding law upholding gender equality. *In 'Indira Swahney I' and 'Indira Swahney-II'* – In these two cases law was declared that caste alone could not be the basis for determining the socially and economically backward class. The creamy layer of those who were advanced socially and economically would not come under backward class irrespective of their caste. In '*Raj Narain* vs State of UP', the Supreme Court declared that people cannot speak or express themselves unless they know. Therefore, right to information is embedded in article 19 and is a fundamental right. *In 'People's Union for Civil Liberties (PUCL) & another vs. Union of India and another'* the Supreme Court held that securing information on the basic details concerning the candidates contesting for elections to the parliament or State Legislature promotes freedom of expression and therefore, the right to information forms an integral part of Article 19(1)(a). This Right to Information is, however, qualitatively different from the right to get information about public affairs or the right to receive information through the Press and Electronic Media, though, to a certain extent, there may be overlapping.

**Do you know**

Common Law functions as an Adversarial System and inquisitional system is followed in Civil Law System. The Adversarial System implies the contest between two opposing parties which present their cases to neutral judge who has to ensure that the trial proceeds according to the procedural rules of trial or due process of law and that evidence entered is done so according to established rules and guidelines. Most of countries that derive their legal systems from the English model, have the Adversarial Legal System. In an Inquisitorial System, a judge is involved in the preparation of evidence along with the police and in how the various parties are to present their case at

the trial. The judge takes on the role of prosecutor and judge in the 'Inquisitorial System'. There are no jury trials in an 'Inquisitorial System' and a judge can compel an accused to make statements and answer questions. This differs from the Common Law and adversarial system of not to take the stand in one's own defence.

## ACTIVITY 12.2

Collect the opinion of at least five of your classmates, friends or adults in your neighborhood on the following questions:

1. Do you think that judges make Law?
2. Do you think that judges interpret Law?
3. Do you agree that duty of a Court is to follow 'Precedents'?

Put their responses in the Table given below and draw conclusions. What opinion do you have regarding these questions?

| Questions | Responses of Persons | | | | |
|---|---|---|---|---|---|
| | Person 1 | Person 2 | Person 3 | Person 4 | Person 5 |
| Question 1 | | | | | |
| Question 2 | | | | | |
| Question 3 | | | | | |

## INTEXT QUESTIONS 12.4

**Write True/False.**

1. Judges play an important role in shaping Law. (True/False)
2. The 'Doctrine of Precedent' is an operating rule of a Common Law System. (True/False)

## WHAT YOU HAVE LEARNT

In any Legal System the Juristic Principles are evolved in the context of rights and the law as command regulates the relationship between individuals and the also the relationship between individual and the government.

Public Law is that part of law, which governs relationship between the State (government / government agencies) with its subject and also the relationship between individuals directly concerning the society.

Private Law is concerned with the relationship between individuals with one another or private relationships between citizens and companies that are not of public importance. It covers matters of pure status (marriage, divorce, kinship and so on); matters involving assets of some sort (property, succession, contracts); and commercial activities in the wider sense.

In Common Law countries, judges play important role and follow the 'Doctrine of Precedent' on the other hand in Civil Law Systems, judges play the comparatively minor role of settling the dispute in front of them.

## TERMINAL QUESTIONS

1. Explain meaning and nature of Public Law.
2. Define Private Law.
3. Write short notes on the following:
   (a) Constitutional Law
   (b) Administrative Law
4. Differentiate between Public and Private Law.
5. Write short notes on the following:
   (a) Interest Theory
   (b) Subordinate Theory
   (c) Subject Theory
6. Discuss the role of Judges in Shaping Law.

## ANSWER TO IN TEXT QUESTIONS

### 12.1

1. Constitutional Law is a branch of Public Law. It determines the political organization of the State and its powers.
2. Criminal Law is the body of law that relates to crime. It enumerates Acts that are threatening, harming, or otherwise endangering the health, safety, and moral welfare of people. It also provides for the punishment /penalty to which any one committing such acts will be liable.

3. Administrative Law is a body of the law created by Administrative Agencies in the form of Regulations, Orders, and Decisions
4. In Short, Public Law governs relationship between the State with its citizens and also relationship bewteen individuals diretly concernings the society. Constitutional Law, Administrative Law, Criminal Law and Criminal Procedure are the Subject matter of Public Law.

## 12.2

1. Private Law is concerned with the relationship between individuals with one another or private relationship between citizens and companies that are not of public importance. Private is substantive and defines the rights of the individuals or it may be adjective indicating the procedure by which rights are to be enforced or protected.
2. The antecedent rights 'in rem' are rights which, irrespective of any wrong having been committed, are available for the benefit of the person of inherence against a person of incidence so unlimited so as to comprise the whole world, while the rights 'in personam' are those available against a definite person and may arise out of agreement of the parties or by virtue of duty assigned by law.
3. The Private 'Adjective Law' provides for the mode in which the State, as such a personality, may sue or be sued.

## 12.3

1. (i) The Interest Theory (ii) The subordinate Theory (iii) The Subject Theory.
2. The 'Interest Theory' as developed by the Roman jurist Ulpian provides that Public Law is that, which concerns Roman State and Private Law is concerned with the interests of citizens.

## 12.4

1. True
2. True

13

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# INDIAN JUDICIAL SYSTEM

The study of legal history or Judicial system consists of the chronological development and growth of a legal system which, in other words means, an analysis of the system of judicial administration prevailing in a particular country in its historical perspective. It is well known that the efficacy of judicial system, by and large, depends upon two major considerations, namely, the existence of a definite hierarchy of courts which follow a simple procedure and a well defined system of law which are uniformly applicable throughout the country. Thus 'Courts' and 'Laws' are the two very important instruments of justice. It is only through the execution of good laws that impartiality in administration of justice can be maintained. Therefore, the subject of legal history of Indian Judicial System mainly deals with the process of gradual evolution and development of "Courts" and "laws" in a chronological order.

It has been rightly said that 'law' is a dynamic concept which changes from time to time and place to place to suit the needs and conditions of a given society which is constantly changing and developing with the advancement of human knowledge and civilisation. The history of human society tells us that "the roots of the present, lie in the past." So, is also the case with the legal institutions. The Courts and laws which we have today, have taken the present shape after years of experimentation and planning. Therefore, in order to appreciate the present judicial system in India, it becomes necessary to probe into the past history of its evolution and development.

## OBJECTIVES

After studying this lesson you will be able to:

- trace the history of the origin and development of Indian Judicial System in India;
- know the structure of Judiciary in India;
- identify the Hierarchy of Judicial System in India;

- explain the Jurisdiction of the Supreme Court of India;
- explain the Jurisdiction of the High Courts;
- understand the working of Subordinate Courts;
- assess certain defects in the existing Judicial system in India; and
- highlight the latest judicial trends in India

## 13.1 PRE-BRITISH ERA

The question quite often arises as to why the beginning of legal history of India is reckoned from the advent of the British East India Company in 1600 A.D. Does it mean that there was no judicial system as such, prior to this period? Obviously the answer is 'No'. The legal and judicial history of India is as old as 5000 years from now. We have references about the existence of a well established judicial system in *Dharmasastras* which contain elaborate laws on different aspects of human conduct. The law was then a part of religion which everyone was supposed to follow meticulously. There were sanctions for the non-observance of these laws. Coming to the Hindu period in the ancient legal history of India, a well organised system of laws and courts is known to have existed for the administration of civil, criminal and revenue justice during the period of Hindu rulers, notably, King Ashok, Chandra Gupta Mourya, Harashvardhan, Kanishka etc. However, with the advent of Mughal rule in India, the Muslim rulers introduced their own laws for judicial administration within their territories whereas the Hindu kingdoms continued with their own judicial system for the administration of justice. Thus, immediately before the arrival of British East India Company, the laws and courts which were in existence in different parts of India were haphazard and had no consistency whatsoever because they mainly depended on the whims and fancies of the rulers who had their own notions of justice which radically differed from one-another. Under the circumstances, it is difficult to establish any direct link between the diverse judicial systems prevailing before 1600 A.D. and the present one. These indigenous legal systems fell into oblivion with the strengthening of the grip of British rule in India in the 17th century. It is mainly for this reason that the indigenous legal systems which prevailed prior to the introduction of British rule in India are generally excluded from the purview of the scope of study of Indian legal history or the Indian Judicial System.

### INTEXT QUESTIONS 13.1

**Mark True/False against the following statement.**

1. "There was no Judicial System in India as such, prior to 1600 A.D." (True/false)
2. "There existed a well established Judicial System in 'Dharamsastra' which contained elborate laws on different aspects of human conduct." (True/False)

## 13.2 BRITISH ERA

The development of Indian Judicial System or legal history of India can be convenienty traced through the following phases:

### 13.2.1 First Phase

From the point of view of chronology, the beginning of the Indian Judicial System can be traced back to Anglo-India era when the judicial system was at its primitive stage. The British settlers established their first settlement at Surat which was an important trading centre at that time. Subsequently, similar settlements started at Bombay and Madras. The British company was entrusted with the responsibility of governing these three petty settlements in India. For the administration of these settlements, they improvised an elementary judicial system whereby they settled their mutual disputes inter-se. The notable feature of this system was that the administration of law and justice was entrusted to non-legal and non-professional Englishmen who belonged to the trading community having little knowledge of law and its procedure. As a matter of fact they were expected to follow the provisions of English Law in discharging their judicial functions, but in practice they decided cases according to their common sense and their notions of justice. The judiciary in the Presidency Towns was completely dependent and subordinated to the Executive which was the supreme administrative authority in British occupied territories in India. This position continued for about a hundred and fifty years.

### 13.2.2 Second Phase

The second phase of history of the Indian Judicial System commences from the establishment of the Supreme Court of Judicature at Fort William (Calcutta) under the Regulating Act, 1773 enacted by the British Parliament which is considered to be a landmark in the development of legal institutions in India. It was an English Law Court which consisted of professional English judges who were well versed in law and legal practice. There was also an English Bar to assist the Court in the administration of justice. This Court was modeled on the pattern of the Court of *Westminster* of England. The Supreme Court was completely independent of the legislature as also the executive. To some extent it even exercised some control over the executive and thus introduced in India the concept of judicial control of administrative actions. The net result was that the powers of the executive government were drastically curtailed which eventually led to hostility and frequent clashes between the Supreme Court and the Supreme Council. It was only after the Settlement Act of 1781 that the differences between these two premier institutions of the Company's government in India were resolved by making the Council independent of the Jurisdiction of the Supreme Court.

### 13.2.3 Third Phase

The third phase in the evolution of the Indian Judicial System or Anglo-Indian legal history begins when the Company itself took up the administration of justice in Bengal by introducing the 'Adalat System' in the mofussils. In the initial stages, the Adaltas were manned by the British executive civil servants of the Company who had no legal training. They, being primarily the executive officers of the Company's government, considered judicial work as their secondary functions of a lesser importance. However, in course of time there was separation of the judicial functions from the executive in civil matters while the administration of criminal justice still remained with the executive official called the Collector. Thus, the Collector-Magistrate played a very significant role in the civil administration and also in the criminal justice system of the Company's government in India. The Adalat System was later extended to other newly acquired territories of the Company in India.

### 13.2.4 Fourth Phase

The next phase of the legal history of India is marked by the unification of dual system of courts prevailing in the Presidency towns and mofussil areas into a single one with the establishment of High Courts under the High Courts Act of 1861. The judicial system of Presidency towns was essentially based on the English law having a distinct British character while the Mofussil territories outside the Presidency town had the Adalat system based on indigenous laws of Hindus and Muslims. The establishment of the High Court by abolishing the Supreme Court and Sadar Adalats of Presidency Towns was an attempt to simplify the judicial system. Therefore, as rightly suggested by Dr. M. P. Jain, "these High Courts may rightly be considered as the precursor of the modern system of law and justice in India." Initially, High Courts were established in Calcutta, Madras and Bombay which were later extended also to other Northern and Western Provinces.

### 13.2.5 Fifth Phase

The emergence of the 'Privy Council' as the highest Court of appeal from India, constitutes yet another important phase of development in the Indian Judicial System. It stimulated proper development of laws in India on a uniform pattern and also motivated the courts to apply high judicial standards in discharging their functions as dispensers of justice. The growth of laws became more conspicuous after 1833 with the setting up of the First Law Commission which started the process of codification of Indian laws to ensure uniformity and certainty in the administration of justice. The Second and the Third Law Commissions took in their hand the task of codification of major laws in India.

### 13.2.6 Sixth Phase

The Government of India Act of 1935 set up the Federal Court of India to act as an intermediate Appellant Court between High Courts and the 'Privy Council' in regard to matters involving the interpretation of the Indian Constitution. It was not to 'pronounce any judgment other than a declaratory judgment' which meant that it could declare what the law was but did not have authority to the exact compliance with its decisions. The Federal Court's power of 'judicial review' was largely a paper work and therefore, a body with very limited power.

### 13.2.7 Post-Independence Era

Despite the restrictions placed on it, the Federal Court continued to function till 26th January 1950, when independent India's Constitution came into force. In the meantime, the ConstituentAssembly became busy drafting the basic framework of the legal system and judiciary. The members of the Constituent Assembly envisaged the judiciary as the guardian of rights and justice. They wanted to keep the judiciary independent and insulated from the coercion and pressures from other organs. 'Sapru Committee Report' on judiciary and the Constituent Assembly's Adhoc Committee on the Supreme Court report formed the bulk of the guidelines for judiciary. A.K.Ayyar, K.Santhanam, M.A.Ayyangar, Tej Bahadur Sapru, B.N.Rau, K.M.Munshi,Saadulla and Dr. B.R.Ambedkar played important role in shaping the judicial system of India.

**Figure 13.1: Dr. B. R. Ambedkar**
Chairman Drafting Committee

The Unitary Judicial System seems to have been accepted with the least questioning. The Supreme Court was to have a special, countrywide responsibility for the protection of individual rights. Dr B. R. Ambedkar was perhaps the greatest apostle in the Assembly of what he described as 'one single integrated judiciary having jurisdiction and providing remedies in all cases arising under the Constitutional law, the Civil, or the Criminal law, essential to maintain the unity of the country'.

With the Indian independence in 1947, the judicial system had to be modified to suit the changed conditions. The jurisdiction of the Privy Council over the Indian appeals came to an end with the establishment of the Supreme Court of India on January 26, 1950. It must, however, be stated that the pattern of judicial administration even after the independence of India, remained more or less the same. Thus, the modern judicial system is essentially the same as

bequeathed to us by the British rulers. It has been said: "this is perhaps the best legacy that the Englishmen have left behind."

Presently, India has a fairly advanced judicial system having a well defined hierarchy of Courts with the Supreme Court at the apex and a number of subordinate Courts below it. The laws are mostly codified having a uniform application throughout the country. The primary object of judicial administration is to ensure even-handed justice to all alike and establish Rule of Law throughout the country. It is, however, distressing to note that introduction of 'uniform civil code' as contemplated by Article 44 of the Constitution of India is not yet accomplished despite the Supreme Court decision in this regard.

The independence of judiciary has been well guarded by the Constitution of India and the provisions of appeal are fair to ensure justice to common man.

## INTEXT QUESTION 13.2

1. "The Regulating Act of 1773 enacted by the British Parliament is considered to be a landmark in the development of Legal Institutions in India."
(True/False)

## 13.3 MODERN JUDICIAL SYSTEM AND HIERARCHY OF COURTS

Modern Nation-States function through a set of institutions. The British Reforms helped India in its present legislative framework.The Parliament, the Judiciary and Executive apparatus such as bureaucracy and the police and the formal structure of Union –State relations as well as the electoral system are the set of institutions constituted by the idea of constitutionalism (i.e. securing the ideals of Constitution). Their arrangements, dependencies and inter-dependencies are directly shaped by the highest politico-legal document of our country - i.e., the Constitution.The legal system derives its authority from the Constitution and is deeply embedded in the political system. The presence of judiciary proves the theory of separation of powers wherein the other two organs, viz. legislature and executive stand relatively apart from it.

Parliamentary Democracy works on the principle of 'Dvisioin of Power,' and in the making of law there is direct participation of the legislature and the executive. It is only the judiciary that remains independent and strong safeguarding the interests of the citizens by not allowing the other organs to go beyond the constitutional limits. It acts, therefore, as a check on the acts of the other two

organs which might violate the Constitution, structure and powers assigned to them. Only Judiciary has the powers of interpreting the Constitution and its mandates, and the say of judiciary has to be followed by all organs.

**Figure 13.2 :** Parliament of India

Indian judiciary is a single integrated and unified system of Courts for the Union as well as the States, which administers both the Union and State laws, and at the head of the entire system stands the Supreme Court of India. The development of the judicial system can be traced to the growth of Modern–Nation–States and constitutionalism.

**Figure 13.3 :** Supreme Court of India

## INTEXT QUESTIONS 13.3

1. "Indian Judiciary is a single integrated and unified system of Courts for the Union as well as the States." (True/False)
2. "The Legal System derives is authority from the Constitution". (True/False)

## 13.4 STRUCTURE OF JUDICIARY

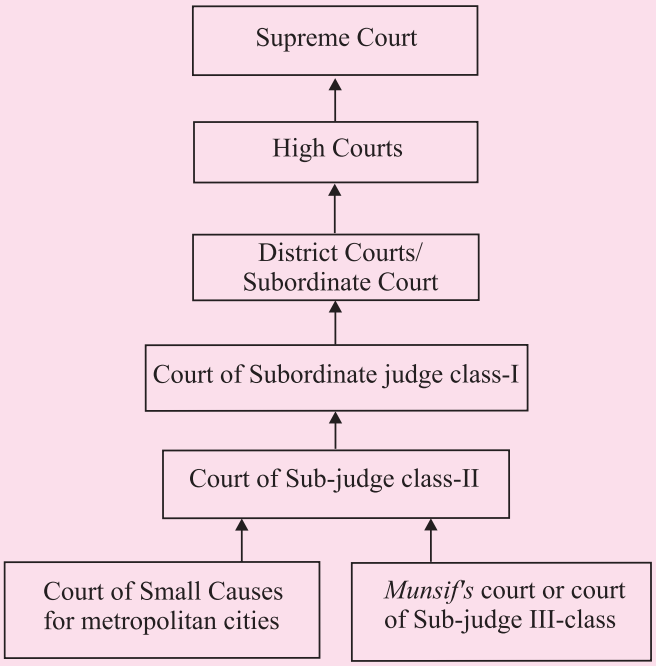
Under our Constitution there is a single integrated system of Courts for the Union as well as the States, which administer both Union and State laws, and at the head of the system stands the Supreme Court of India. Below the Supreme Court are the High Courts of different States and under each High Court there are 'subordinate courts', i.e., courts subordinate to and under the control of the High Courts.

At the top of the judicial system is Supreme Court of India followed by High Courts at State level. There are 21 High Courts in the Country. At the District level, there are Subordinate District Courts.

### Supreme Court of India

The Supreme Court is the apex Court at national level which was established on 28th January 1950, under Article 124(1) of the Constitution of India. In this context, Article 124 (1) reads as "there shall be a Supreme Court of India consisting of the Chief Justice of India and until Parliament, by law, prescribe a large number of not more than 7 judges. "Though by 2009 Amendment, the number of judges in Supreme Court was raised to 31 including the Chief Justice. All proceedings in the Supreme Court are conducted in English. The seat of Supreme Court is in Delhi and the proceedings are open to the public.

**Hierarchy of Civil Judicial System**


Supreme Court
High Courts
District Courts/ Subordinate Court
Court of Subordinate judge class-I
Court of Sub-judge class-II
Court of Small Causes for metropolitan cities
*Munsif's* court or court of Sub-judge III-class

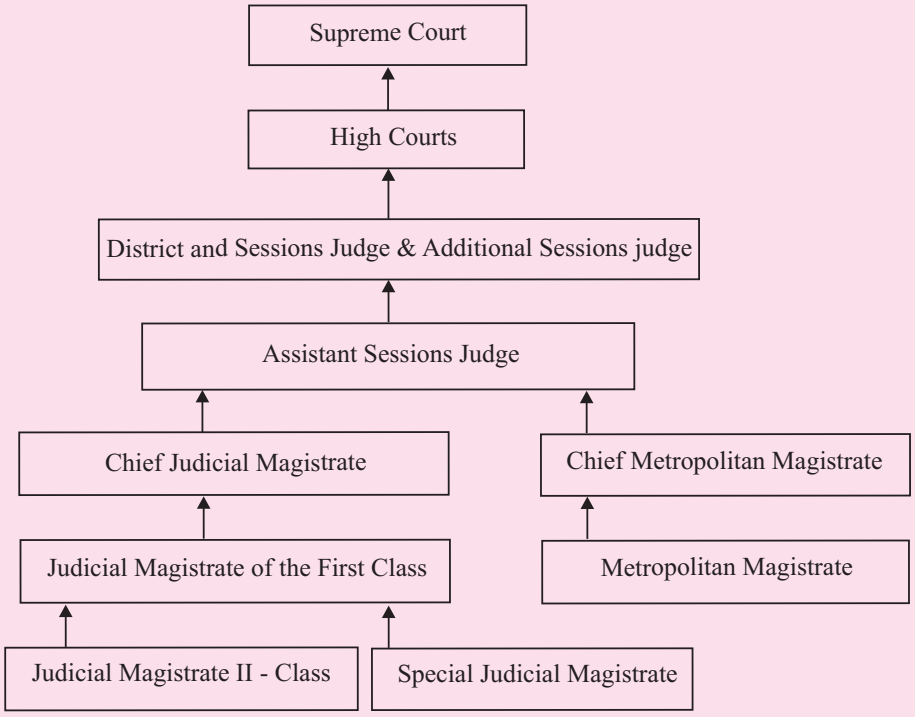
## High Courts

The highest Court in the State is the High Court constituted under Article 214 of the Constitution which reads there shall be a High Court in each State. There are at present, 21 High Courts in the Country. Each High Court comprises of a Chief Justice and such other judges as the President of India from time to time appoint.

## Subordinate Courts

The judicial system comprises of subordinate courts which represent the first-tier of the entire judicial structure. As a general rule, Civil cases are dealt with by one set of Hierarchy of Court known as Civil Court and Criminal cases by another known as Criminal Court. The Power of Civil courts are governed by Civil Procedure Code (CPC) and power of Criminal Court are governed by Criminal Procedure Code(Cr.pc) respectively. Following is the hierarchy chart of all civil and criminal courts in India.

**Hierarchy Chart of Civil and Criminal Courts in India**



## INTEXT QUESTIONS 13.4

1. The Salient feature of Indian Judiciary is that it has a single integrated and unified Judicial System. (True/False)
2. Courts in India are like a pyramid. (True/False)

3. The Jurisdictions of Privy Council over the Indian appeals came to an end with the establishment of Supreme Court of India on January 26, 1950. (True/False)

4. The Supreme Court is the Apex Court in India. (True/False)

## 13.5 JURISDICTION OF THE SUPREME COURT

The Supreme Court has vast jurisdiction and its position is strengthened by the fact that it acts as a Court of Appeal, as a guardian of the Constitution and as a reviewer of its own judgements. Article 141 declares that the law laid down by the Supreme Court shall be binding on all courts within the territory of India. Its jurisdiction is divided into four categories:

(a) ***Original Jurisdiction and Writ Jurisdiction:*** Article 131 gives the Supreme Court exclusive and original jurisdiction in a dispute between the Union and a State, or between one State and another, or between a group of States and others. It acts, therefore, as a Federal Court, i.e., the parties to the dispute should be units of a federation i.e. a State of India. No other court in India has the power to entertain such disputes.Supreme Court is the guardian of Fundamental Rights and thus has non-exclusive original jurisdiction as the protector of Fundamental Rights. It has the power to issue writs, such as Habeas Corpus, Quo Warranto, Prohibition, Certiorari and Mandamus. In addition to issuing these writs, the Supreme Court is empowered to issue appropriate directions and orders to the executive. Article 32 of the Constitution gives citizens the right to move to the Supreme Court directly for the enforcement of any of the Fundamental Rights enumerated in part III of the Constitution.

(b) ***Appellate Jurisdiction:*** The Supreme Court is the highest Court of Appeal from all courts. Its appellate jurisdiction may be divided into:

(i) cases involving interpretation of the Constitution - civil, criminal or otherwise;

(ii) civil cases, irrespective of any Constitutional question; and

(iii) Criminal cases, irrespective of any Constitutional question.

Article 132 provides for an appeal to the Supreme Court by the High Court certification, the Supreme Court may grant special leave to the appeal. Article 133 provides for an appeal in civil cases, and article 134 provides the Supreme Court with appellate jurisdiction in criminal matters. However, the Supreme Court has the special appellate jurisdiction to grant, in its discretion, special leave appeal from any judgment, decree sentence or order in any case or matter passed or made by any court or tribunal.

(c) ***Advisory Jurisdiction:*** Article 143 of the Constitution vests the powers of the President to seek advice regarding any question of law or fact of public importance, or cases belonging to the disputes arising out of pre-constitution treaties and agreements which are excluded from its original jurisdiction. This jurisdiction does not involve a law, the advisory opinion is not binding on the government, it is not executable as a judgment of the court and the court may reserve its opinion in controversial political cases as in the 'Babri Masjid case'.

(d) ***Review Jurisdiction:*** The Supreme Court has the power to review any judgment pronounced or order made by it. Article 137 provides for review of judgment or orders by the Supreme Court wherein, subject to the provisions of any law made by the Parliament or any rules made under Article 145, the Supreme Court shall have the power to review any judgment pronounced or made by it. However, the Supreme Court jurisdiction may be enlarged with respect to any of the matters in the Union List as Parliament may by law confer. Parliament may, by law, also enlarge or can impose limitations on the powers and functions exercised by the Supreme Court. Since Parliament and the Judiciary are created by the Constitution, such aforesaid acts must lead to harmonious relationship between the two, and must not lead to altering the basic structure of the Constitution. Moreover, all these powers can also be suspended or superseded whenever there is a declaration of emergency in the country.

## INTEXT QUESTIONS 13.5

Fill in the Blanks:

1. The Judges of the Supreme Courts are appointed by the ..... .
(Prime Minister/President/Law Minister)

2. The Judges of the Supreme Court retire at the age of ..... .
(60/62/65)

3. The dispute between two or more States is brought before the Supreme Court under its ..... Jurisdiction. (Original/appellate/advisory)

4. The ultimate power of interpreting the Constitution of India lies wtih ..... . (High Courts/Supreme Court/Session Courts)

## 13.6 HIGH COURTS

There shall be High Court for each State (Article 214), and every High Court shall be a Court of record and shall have all the powers of such a Court including the power to punish for contempt of itself (Article 215). However, Parliament may, by law, establish a common High Court for two or more States and a Union

Territory (Article 231). Every High Court shall consist of a Chief Justice and such other judges as the President may from time to time deem it necessary to appoint. Provisions for additional judges and acting judges being appointed by the President are also given in the Constitution. The President, while appointing the judges shall consult the Chief Justice of India, the Governor of the State and also the Chief Justice of that High Court in the matter of appointment of a judge other than the Chief Justice. A judge of a High Court shall hold office until the age of 62 years. A judge can vacate the seat by resigning, by being appointed a judge of the Supreme Court or by being transferred to any other High Court by the President. A judge can be removed by the President on grounds of misbehaviour or incapacity in the same manner in which a judge of the Supreme Court is removed.

## Jurisdiction of High Courts

The jurisdiction of the High Court of a State is along with the territorial limits of that State. The original jurisdiction of High court includes the enforcement of the Fundamental Rights, settlement of disputes relating to the election to the Union and State legislatures and jurisdiction over revenue matters. Its appellate jurisdiction extends to both civil and criminal matters. On the civil side, an appeal to the High Court is either a first appeal or second appeal.

The criminal appellate jurisdiction consists of appeals from the decisions of:

(a) A Session Judge, or an additional Session Judge where the sentence is of imprisonment exceeding 7 years

(b) An Assistant session judge, Metropolitan Magistrate of other Judicial Magistrate in certain certified cases other than 'petty' cases.

The writ jurisdiction of High Court means issuance of Writs/orders for the enforcement of Fundamental Rights and also in cases of ordinary legal rights. High Court also has the power to superintend over all other courts and tribunals, except those dealing with armed forces. It can also frame rules and issue instructions for guidance from time to time with directions for speedier and effective judicial remedy. High Court also has the power to transfer cases to itself from subordinate courts concerning the interpretation of the Constitution. Interpreting the Constitution means guiding the manner in which its provisions are to be applied. However, the Parliament, by law, may extend the jurisdiction of a High Court to, or exclude the jurisdiction of a High Court from, any Union Territory. High Courts' power of original and appellate jurisdiction is also circumscribed by the creation of Central Administrative Tribunals, with respect to services under the Union and it has no power to invalidate(declare void) a Central Act, rule, notification or order made by any administrative authority of the Union.

## INTEXT QUESTIONS 13.6

**Fill in the blanks.**

1. The Judges of the High Court are appointed by the ..... .
(Governor/President/Prime Minister)

2. At present there are ..... High Courts in India. (20, 21, 18)

3. The retirement age of the Judges of a High Court is ..... years.
(60, 65, 62)

## 13.7 SUBORDINATE COURTS

The hierarchy of courts that lie subordinate to High Courts are referred to as Subordinate Courts. It is for the State Governments to enact for the creation of Subordinate Courts. The nomenclature of these subordinate courts differs from State to State but broadly there is uniformity in terms of the organisational structure (i.e. the hierarchy remains the same for every State at the most). Below the High Courts, there are District Courts for each district, and has appellate jurisdiction in the district. Under the District Courts, there are the lower courts such as the Additional District Court, Sub Court, Munsiff Magistrate Court, Court of Special Judicial Magistrate of I class, Court of Special Judicial Magistrate of II class, Court of Special Munsiff Magistrate for Factories Act and labour laws, etc. Below the Subordinate Courts, at the grass-root level, are the Panchayat Courts (Nyaya Panchayat, Gram Panchayat, Panchayat Adalat, etc.). These are, however, not considered as courts under the purview of the criminal courts jurisdiction.District Courts can take cognizance of original matters under special status.

The Governor, in consultation with the High Court, makes appointments pertaining to the District Courts. Appointment of persons other than the District Judges to the judicial service of a State is made by the Governor in accordance with the rules made by him in that behalf after consultation with the High Court and the State Public Service Commission. The High Court exercises administrative control over the District Courts and the courts subordinate to them, in matters as posting, promotions and granting of leave to all persons belonging to the State Judicial Service.

## INTEXT QUESTIONS 13.7

1. Which is the highest Criminal Court in a District?

2. Name the highest Civil Court of a District?

## 13.8 DEFECTS IN EXISTING JUDICICAL SYSTEM

Despite many positive aspects of the Indian legal system, there are certain glaring defects in the existing Judicial system which need to be removed. A few of them are noted below:-

1. The Supreme Court and the High Courts are overburdened with appellate work which causes inordinate delay in disposal of appeals.
2. The Subordinate Courts are also overworked. That apart, they are unduly influenced by the executive quite often, which hampers the cause of impartial justice. The civil and criminal cases are prolonged due to frequent adjournments from the parties and their Counsel. The judges have a tendency to grant adjournment as a matter of routine.
3. The litigation, particularly the civil litigation, is too costly an affair and is beyond the reach of a common man. At times people are compelled to forego their legitimate claims and prefer to suffer injustice due to expensive justice.
4. Corrupt practices at the Bar and the clerical level interference in the courts, defeat the purpose of law and justice.
5. Touts and professional witnesses are seen roaming about in courts in search of their client. The ignorant and illiterate litigant fall an easy prey to their underhand tactics. This frustrates the cause of justice.
6. Many of the existing laws being more than a century old, have become obsolete and outdated. Therefore, they need to be repealed or amended.' In order to bring about uniformity and certainty in the law relating to damages, the law of torts should be codified on the pattern of American Restatement of Law of Tort.

### INTEXT QUESTIONS 13.8

1. Enlist the main defects in the existing Judicial System in India.
2. State any three defects in the existing Judicial System.

## 13.9 NEW JUDICIAL TRENDS OR DEVELOPMENTS IN INDIAN JUDICIAL SYSTEM

After the Indian' independence, the Supreme Court has been making streneuous efforts to reshape the Indian law to suit the needs of changing society through its judicial pronouncements some of which have assumed historic importance in recent years. To quote a few, the classic decision of the Supreme Court in *Kesawanand Bharti,* otherwise known as the Fundamental Rights case; the *Judge's Transfer case; Dr.* Dastane *Case; Bangalore Wafer Supply v. Rajappa; National Textile Worker's Union* v. *P.R. Ramkrishnan, M.C. Mehta* v. *Union*

of India, are only a few illustrations of the creative role of the Supreme Court of India.

More recently, the latest judicial trend of Public Interest Litigation, which during initial state Prof. Upendra Baxi prefers to call it as "Social action litigation", which has opened new vistas for judicial activism and taking justice nearer to the common man. The Supreme Court and some of the High Courts have shown deep interest in PIL cases with a view to ameliorating the miseries and hardships of poor litigants who could not withstand the rigours of the conventional adversarial system of litigation which mostly provides relief only to rich and wealthy litigants. Besides providing relief to poor and needy litigants, the public interest litigation also provides an effective check against the governmental lawlessness and the callous and negligent attitude of the executive official by making them accountable for their lapses or arbitrary acts. It is indeed a very happy development in the legal history of the 20th century in India as it makes Indian judiciary an instrument of social justice for the welfare of the Indian people as a whole. The inception of Lok Adalats for on-the-spot disposal of cases in civil, revenue, criminal and matrimonial matters and insurance claims or motor vehicle accident cases is one more notable feature of the modern judicial system of India.

Indeed, Public Interest Litigation (PIL) as a powerful arm of the legal aid movement in India towards the end of 1970's has come into full bloom in the next two decades. Commenting on the achievements and social dimensions of the public interest litigation, the Supreme Court of India, in its decision in *P. Nallathampy Thera v. Union of India* quoted from Henry Peter Brougham and observed, "it was the boast of Augustus that he found Rome of bricks and left it of marble. But how much nobler will be the boast of the citizens of free India of today when they shall have to say that the law dearer and left it cheaper; found it a sealed book and left it a living letters found it patrimony of the rich and left it the inheritance of the poors found it the two-edged sword of craft and expression and left it the staff of honesty and a shield of innocence". Public Interest Litigation is very helpful to the people in getting justice. It has resulted in 'Judicial Activism'.

Again, taking a serious view of contravention of human rights and fundamental freedoms, the protection which is guaranteed in the Constitution, the Supreme Court in *Nilabati Behra v. State of Orissa,* rejecting the government's claim of sovereign immunity, ruled that the rule of Sovereign immunity is alien to the concept of guarantee of fundamental rights and there can be no question of such a defence being available in the constitutional remedy. The Court further observed, the remedy in public law has to *be more* readily available when invoked by the have-nots, who are not possessed of wherewithal for enforcement of their rights in private law, even though its exercise is to be tampered by judicial restraint to avoid circumvention of private law remedies, were more apropriate".

The Court in this case ordered compensation of one lakh rupees to be paid by the court to the petitioner for the custody death of petitioner's son Sumar Behera.

The origin, evolution and development of the modern Indian Judicial System is not the creation of one man or of one day. It is rather an outcome of the concerted efforts and experience of a number of able administrators who laboured patiently for generations. It further needs to be emphasised that the history of Indian System is not of a mere theoretical significance but it has a great practical value. The higher judiciary handed down cases of great legal importance which have gone a long way in shaping the judicial institutions in India. Particularly, the contribution of the Privy Council in this area deserves a special mention as most of its *decisions are f*ollowed as precedents having a persuasive value even to this day.

## INTEXT QUESTIONS 13.9

1. Explain the meaning of PIL.
2. Which are the two new Judicial Trends or development in Indian Judicial System?

## WHAT YOU HAVE LEARNT

The legal and Judicial history of India is as old as 5000 years from now. From the point of view of chronology, the beginning of Indian Judicial System can be traced back to Anglo-India era when the Judicial System was at its primitive stage. The Regulating Act of 1773 enacted by the British Parliament is considered to be a landmark in the development of Indian Judicial System in India.

The Jurisdiction of Privy Council over the Indian appeals came to an end with the establishment of Supreme Court on January 26, 1950.

The salient feature of Indian Judiciary is that it has a single integrated and unified Judicial System.

The structure of courts in India is like a pyramid. The Supreme Court is the Apex Court in India. The Highest Court in the State is High Court. Then there are Subordinate Courts at District, Sub-Division and Tehsil level.

The growth, evolution and development of modern Indian Judicial System is not the creation of one man or of one day. It is rather an outcome of the concerted efforts and experience of a number of able administrators who laboured patiently for generations.

## TERMINAL QUESTIONS

1. Explain the original and Appellate Jurisdiction of the Supreme Court.
2. "Supreme Court is the guardian of Indian Constitution and a protector of Fundamental Rights" Explain.
3. Discuss briefly the Original and Appellate Jurisdiction of the High Court.
5. Explain the importance of PIL in our day to day life.

## ANSWER TO INTEXT QUESTIONS

### 13.1

1. False
2. True

### 13.2

1. True

### 13.3

1. True
2. True

### 13.4

1. True
2. True
3. True
4. True

### 13.5

1. President
2. 65
3. Original
4. Supreme Court

## 13.6

1. President
2. 21
3. 62

## 13.7

1. Distt. and Session Judge
2. Distt. and Session Judge

## 13.8

1. The main defects are
   (i) Inordinant delay in the disposal of cases.
   (ii) Corrupt practices at Bar and at the clerical levels in the Lower Courts.
   (iii) The litigation is too costly and is beyond the reach of common man.
   (iv) The existing Laws being old, have become obsolete and outdated.
   (v) The Supreme Courts and High Courts are overburdened with appellate work.
2. (i) The litigation is too costly and is beyond the reach of common man.
   (ii) Inordinant delay in the disposal of cases.
   (iii) Corrupt practices at the Bar and at the clerical levels in the lower courts.

## 13.9

1. PIL is a powerful arm of the legal aid movemnet in India. It is very helpful to the people in getting justice promptly. It has also resulted in 'judicial activism'.
2. (i) Judicial Activism
   (ii) PIL

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# 14

# JUSTICE DELIVERY SYSTEM

Having discussed the origin and development of Indian Judicial System and also the hirachy of Civil and Criminal Courts functioning in Modern India, it would be in the fitness of things to give an account of Civil Matters and Criminal Matter – their kinds and also the different stages through which a Civil and Criminal Matter passes in a Court of Law.

Besides regular Civil and Criminal Courts, there are many other ways to settle a disputes. 'Tribunals' defined as adjudicatory bodies other than courts, help in reducing the burden of courts by deciding disputes of special or technical nature requiring special knowledge. So, dispute resolution through Tribunals is also part of the dispute resolving mechanism in modern India. Tribunals are basically constituted to deal with a particular specialized branch of Law.

While making a comparison between regular Courts and Tribunals and their functioning, it can be said that Courts (Civil and Criminal both) follow a strict procedure of law, whereas Tribunals adopt a relaxed approach to the technical rules of law. The chairman and other members who are experts in the relevant field decide the matter. Some of the Tribunals functioning in India are – Central Administrative Tribunal (CAT), Income Tax Tribunal and Industrial Tribunal. There are also Tribunals constituted and working at State level.

## OBJECTIVES

After studying the lesson you will be able to:

- describe the term 'Civil Matter';
- understand the meaning of the term 'Criminal Matter' or 'criminal dispute';
- identify the various stages of 'Civil Matter' or Civil Suit;
- know the various stages of 'Criminal Matter' or a 'criminal dispute';
- define a 'Tribunal' and discuss its functioning; and
- understand the difference between a regular Court and a Tribunal.

## 14.1 CIVIL AND CRIMINAL MATTERS OR DISPUTES

Generally speaking disputes are of two kinds – Civil and Criminal. A Civil matter is a legal matter that arises under Civil Law. In Civil matters or disputes, parties are found asserting or disputing claims over rights such as property right e.g. ownership right, partition of property, contractual rights etc. Some examples of Civil matters are money recovery matters, property matters, injunction matters, negligence etc. Civil matters deal with private wrong (private wrong in simple legal terminology means dispute between parties only), whereas criminal matters deal with public wrongs.

A criminal matter is a legal matter that arises under Criminal Law. Criminal offence i.e. hurt, injury, murder etc. even though committed by one party upon the other party, is considered to be a 'public wrong'. Public wrong is violation of public rights and duties that affect the entire community. Being a wrong against the whole community, Government of the State files a case against the guilty person. In certain cases criminal proceedings are initiated on a complaint from individual (other than State).

There are certain offences such as negligence, false imprisonment, trespass to land (intrusion upon another person's land), assault (physical attack) etc. which are treated as 'civil wrong' and dealt with under law of Torts, another branch of Law.

**Figure 14.1:** Justice Delivery System in India, Supreme Court

### INTEXT QUESTIONS 14.1

**Write True or False**

1. A Civil Matter is a legal matter that arises under Civil Law. (True/False)
2. A Criminal Matter is a legal matter that arises under Criminal Law. (True/False)
3. There are certain offences such as negligence, false imprisonment, tresspass etc. which are treated as civil wrong and are dealt with under Law of Torts. (True/False)

## 14.2 CIVIL MATTERS – DIFFERENT STAGES

In civil matters the party which files the case is known as 'plaintiff' and the party against whom the case is filed is known as 'defendant'. In legal terminology, civil case is known as suit. Civil suit or case passes through following stages:

1. **Filing of plaint** ('plaint' is a legal term for the case filed by the plaintiff) - First stage of the civil matter is filing of the plaint. Case/plaint prepared by the advocate is filed in the appropriate Court of law.
2. **Issuing summons to the opposite party** - Once a case is filed then summons i.e. intimation of the filing of that case is sent by the Court to the other party.
3. **Appearance of defendant** – On receiving summons defendant enters appearance and files its response to the case filed by the plaintiff. The response filed by the defendant is known as Written Statement. Plaintiff can file a replication (reply) to the written statement filed by the defendant.
4. **Framing of issues** – After filing of plaint, written statement and replication, Court frames issues i.e point of disputes raised in the matter.
5. **Recording of evidence** – Thereafter, evidence on behalf of the parties are filed. By way of evidence, parties try to prove their case and disprove other party's case. Generally plaintiff's evidence takes place first and thereafter evidence on behalf of defendant is lead.
6. **Arguments** – After completion of recording of evidence, arguments are advanced on behalf of the disputing parties.
7. **Judgment** – After hearing arguments and appreciating evidence filed by the parties, Judge delivers judgement in the case and the matter gets decided in favour of either party. The Dissatisfied party has the right to approach the higher Court by way of appeal or any other remedy.

### ACTIVITY 14.1

Visit a civil court of a your district, observe its functioning/working and try to make a list of civil suits lying pending in this court.

### INTEXT QUESTIONS 14.2

1. **Fill in the Blanks:**
   (a) In civil matters the party which files the case is known as ..... .
   (b) In civil matters the party against whom the case is filed is known as ..... .
   (c) In legal terminology, civil case is known as ..... .
2. List the different stages through which a civil suit passes in Civil Court.

## 14.3 CRIMINAL MATTERS – DIFFERENT STAGES

In criminal matters, State initiates legal proceedings on behalf of the victim against the offender. Criminal matters deal with commission of an offence. Offence is a public wrong or crime. Some examples of offence are causing physical hurt or injury, theft, robbery, murder, kidnapping etc. Person who commits the offence is known as accused.

Different stages through which criminal trial passes are mentioned below:

1. **FIR Registration** – FIR stands for first information report. It is intimation to the police authorities that a particular offence has been committed against victim. Lodging of FIR in the Police Station is the first step towards initiation of a criminal case. It is only after the registration of the FIR that a police officer can investigate the case.
2. **Investigation** – After FIR has been lodged, investigation of the matter would be conducted by Police authorities to find out whether in reality any offence has been committed or not and if so who has committed the offence. Collection of evidence in criminal matter is the task of the investigating agency. Collection of evidence includes recording statement of witnesses, seizure of documents and seizure of case property involved in the commission of the offence. If on investigation any offence is found to have been committed then Chargesheet is filed in the matter and matter goes for trial otherwise matter gets closed and a closure report is filed.
3. **Filing of Chargesheet** – Chargesheet is a kind of report explaining how an offence had been committed, by whom it was committed and under which provision of law is it covered. On filing of chargesheet, if the Court is satisfied that an offence has been committed the court takes cognizance and issue summons for appearance of the accused.
4. **Framing of Charges** – Court looks into the matter and evidence collected by the investigating agency to see what offence has been committed by the accused and under which provision of law should he be charged like whether accused has committed theft, robbery or any other offence. Judge on the basis of evidence collected by the investigating agency may come to the conclusion that no offence has been committed by the accused, in that case accused would be discharged of that offence i.e he/she would be declared as having committed no offence.
5. **Prosecution Evidence** – After framing of charges, prosecution is required to produce entire evidence collected by investigating agency along with statement of prosecution witness. Witness is a person who gives statement in favour of a party who brings him/her for proving its case.
6. **Statement of Accused** – Thereafter, Court asks for an explanation from the accused regarding the accusations made against him/her. Accused is given an opportunity to explain.

7. **Defense Evidence** – After recording of statement of accused if Court finds that no offence is committed by the accused, then he/she is acquitted i.e., held to have committed no offence. But if court has any doubt regarding commission of offence then it calls for defense evidence to disprove prosecution case. Accused then produce witness on his/her behalf to prove his/her innocence in the matter.
8. **Arguments** – After completion of recording of evidence arguments are advanced from both the sides, of a dispute.
9. **Judgment** – Thereafter, judgment (judgment means decision of the Court) either convicting i.e. holding accused guilty of having committed an offence or acquitting is given.
10. **Argument and Judgment on Sentence** – If accused is convicted for an offence, then prosecution as well as defense side addresses arguments on what punishment should be given to the accused out of the maximum punishment given for the offence under law.
11. **Judgment on Sentence** – After hearing arguments on sentence, Court pronounces its decision on the quantum of punishment to be given to the accused. Age, background, past criminal history of accused etc. are also determinative factors in awarding punishment to accused.
12. **Appeal** – Prosecution or defense as the case may be, can approach the higher Court if they remain dissatisfied by the decision of the lower Court, by filing an 'Appeal'.

## INTEXT QUESTIONS 14.3

1. Define the following Terms:
   (a) FIR
   (b) Arguments
   (c) Judgement
   (d) Appeal.
2. **Write True or False**
   (a) In criminal matters, State initiates legal proceedings on behalf of the victim against the offender. (True/False)
   (b) Offence is a 'public wrong' or 'crime'. (True/False)

## 14.4 DISPUTE RESOLUTION THROUGH TRIBUNALS

There are many ways to settle a dispute and it is not necessary to be standing in front of a formal Court for seeking justice. Tribunals can be defined as

adjudicatory bodies other than courts with administrative or judicial functions. There are various Tribunals constituted under different law for resolving disputes among parties such as 'Industrial Tribunal' to resolve industrial disputes, 'Administrative Tribunal' for resolving disputes concerning Government, 'Income Tax Tribunal' for resolving income tax related disputes etc. These Tribunals are less expensive and less formal than courts and resolution of disputes takes place in a much more relaxed manner. Tribunals are basically constituted to deal with a particular specialized branch of law. In Tribunals, dispute is decided by Tribunal Members having special knowledge of the matter. Tribunals also help in reducing burden of Courts by deciding disputes of special or technical nature requiring special knowledge.

## INTEXT QUESTIONS 14.4

1. Define 'Tribunal'
2. **Fill in the Blanks**
   (a) The Tribunal resolving Industrial disputes is known as ……..
   (b) The Tribunal resolving Income Tax disputes is known as ……..
3. **Write True or False**
   (a) In Tribunals, dispute is decided by Tribunal members having special knowledge of the matter (True/False)
   (b) Tribunals are basically constituted to deal with a particular specialised branch of Law (True/False)
   (c) Tribunals help in reducing burden of courts by deciding disputes of special or technical nature requiring special knowledge. (True/False)

## 14.5 COMPARISON BETWEEN COURTS AND TRIBUNALS

Courts follow strict procedure of law whereas Tribunals adopt a relaxed approach to the technical rules of law.

In Courts, people rarely get a chance to speak and most of the talking is done by lawyers. On the other hand, Tribunals encourage people to stand up and speak and lawyers have little role to play in the settlement of disputes.

Courts have the power to decide variety of cases whereas Tribunals specialize in a particular area of law.

Litigation in Courts is very costly as one has to pay various kinds of fees apart from the fees of Advocates. On the other hand Justice delivered by tribunals prove to be cheaper and quicker.

The proceedings of a Court are presided over by a Judge or a Magistrate. On the other hand in Tribunals, a Chairman and other Members who are experts in the relevant field decide the matter.

Tribunals have lesser powers as compared to a regular Court. For example, a Tribunal cannot order imprisonment of a person which is common for a Regular Court.

An Advocate is necessary in case of Courts whereas they are rarely needed in case of Tribunals.

## INTEXT QUESTIONS 14.5

**Write True or False**

(a) Courts have the power to decide variety of cases, whereas Tribunals specialise in a particular area of Law. (True/False)

(b) Courts follow strict procedure of Law whereas Tribunals adopt a relaxed approach to the technical rules of Law. (True/False)

(c) Tribunals have lesser powers then a Regular Court. (True/False)

(d) Litigation in Courts is very costly, whereas justice delivered by Tribunals prove to be speedy and less expensive. (True/False)

## WHAT YOU HAVE LEARNT

Disputes are generally of two kinds — Civil and Criminal. A Civil Matter or dispute is a legal matter that arises under Civil Law. Criminal Law deals with criminal offences i.e. murder injury, hart, theft, robbery, Kidnapping etc.

The different stages of Civil Matters or disputes are — Filing of plaint, issuing summons to the opposite party, appearance of defendant, framing of issues, recording of evidence, arguments on behalf of parties and delivery of judgement by the Court.

Different stages through which Criminal Matter passes are — Lodging of FIR, investigation conducted by police, filing of chargesbeet, Framing of charges, prosecution evidence, statement of the accused, arguments advanced by both the disputing parties, judgement or decision of the Court, arguments on punishment and appeal against the decision of lower court.

Tribunals can be defined as adjudicatory bodies other than courts having administrative or Judicial functions. There are various Tribunals constituted under different law for resolving disputes among parties such as Industrial

Tribunal to resolve industrial disputes, Administrative Tribunal for resolving disputes concerning government, Income Tax Tribunal for resolving income tax related disputes.

While making a comparasion between Courts and the Tribunals it can be said that Courts follow strict procedure of Law, whereas Tribunals adopt a relaxed approach to the technical rules of Law. Again, Courts have the power to decide variety of cases, Tribunals specialise in a particular area of Law. Proceedings of a Court are presided over by a Judge or a Magistrate. On the other hand in Tribunals, a Chairman and other Memberes who are experts in the relevant field decide the matter.

## TERMINAL QUESTIONS

1. Define 'Civil Matters'.
2. Define 'Criminal Matters'.
3. Discuss the different stages through which Criminal Matters passes in a court of Law.
4. Describe the different stages through Civil Matters passes in a court of Law.
5. Define a 'Tribunal'.
6. Make a comparasion between Courts and Tribunals.

## ANSWER TO INTEXT QUESTIONS

### 14.1

1. True
2. True
3. True

### 14.2

1. (a) Plaintiff
   (b) Defendant
   (c) Civil Suit
2. (i) Filing of Plaint
   (ii) Issuing Summons to the opposite party
   (iii) Appearance of Defendant

(iv) Framing of issues

(v) Recording of Evidence

(vi) Arguments

(vii) Judgement

## 14.3

1. (a) **FIR —** FIR stands for first information report. It is intimation to the police authorities that a particular offence has been committed against victim. Lodging of FIR in the Police Station is the first step towards initiation of a criminal case.

   (b) **Arguments —** After Completion of recording of evidence arguments are advanced from both sides of a dispute.

   (c) **Judgement —** Judgement means decision of the Court.

   (d) **Appeal —** Prosecution or defence as the case may be, can approach the higher court if they remain dissatisfied by the decision of the lower Court.

2. (a) True

   (b) True

## 14.4

1. Tribunals can be defined as adjudicatory bodies other than Courts, and performing administrative or Judicial functions.

2. (a) Industrial Tribunal

   (b) Income Tax Tribunal

3. (a) True

   (b) True

   (c) True.

## 14.5

(a) True

(b) True

(c) True

(d) True

Notes

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15

# ALTERNATE DISPUTE RESOLUTION MECHANISM

The Constitution of India aims at providing protection of life and personal liberty. For this purpose, the Constitution provides for a system of Courts. In India, the Supreme Court of India is at the apex of entire judiciary system with a High Court for each State or a group of States. Punjab and Haryana have one High Court at Chandigarh. The seven States in North East India have only one High Court at Guwahati. Under the High Court, there is a hierarchy of subordinate Courts. The Courts have well defined and recognized system of settling the disputes. The Courts have formal rules for settlement of disputes and their decision is binding on the parties. The system is highly technical and formal. But the litigation does not always lead to satisfactory results. It is expensive in terms of money and time. These are the reasons due to which parties look upon an alternate way of resolving their disputes.

## OBJECTIVES

After studying this lesson you will be able to:

- appreciate the need for Alternative Dispute Resolutions (ADR) Mechanism;
- list various methods of Alternative Dispute Resolution (ADR);
- describe the procedures, methods and the advantages by following alternative dispute resolution mechanism;
- explain certain legal terms connected with ADR;
- appreciate the role of ADR in cheap and speedy Justice;
- discuss the nature of disputes capable of being settled by adopting ADR; and
- know the various provisions of the Legal Services Authority Act, 1987 (Amendment Act, 1994)

## 15.1 NEED FOR ALTERNATIVE DISPUTE RESOLUTION MECHANISM

It is a well known fact that the present Judicial System is extremely expensive and delaying. The parties to a dispute have to wait for Justice for years. This lengthy and expensive process of litigation has reduced the faith of common people in the Judicial System being followed by the Courts. These weaknesses of Judicial System has given birth to alternative remedies for the disposition of disputes. Alternative remedies provide cheap and speedy Justice and that is the reason that ADR mechanism is being preferred by the disputing parties for the resolution of their disputes.

## 15.2 ALTERNATIVE DISPUTE RESOLUTION (ADR)

Arbitration was very popular and prevalent in ancient India, too and 'Awards' were the decisions of Panchayats, which were binding in nature. ADR refers to the methods of resolving a dispute, which are alternatives for litigation in Courts. ADR processes are decision making processes that do not involve litigation or violence. In India, an alternative system is available to the disputing parties including Arbitration, Conciliation, Mediation, Negotiation etc.

The approach of judges, lawyers and parties all over the world is changing in favour of adoption of ADR instead of Court litigation. Arbitral institutions provide ADR services for quicker, less costly and consensual resolution of civil disputes outside the crowded court system. ADR promotes communication between the parties and enables them to solve their actual concerns behind the disputes.

Many disputes like consumer complaints, family disputes, construction disputes, business disputes can be effectively resolved through ADR. It can be used in almost every kind of dispute which can be filed in a court as a civil dispute. When a civil suit is filed in a court of law, a formal process takes place, which is operated by advocates and managed by the court and the parties are then left to wait for the orders of the Court. The outcome of the case is uncertain. After the decision of the case there can be an appeal or other proceedings which may further delay the implementation of the decision of the case.

Figure 15.1

Notes

## INTEXT QUESTIONS 15.1 AND 15.2

1. Why there is a need for Alternative Dispute Resolution (ADR) Mechanism?
2. Define briefly Alternative Dispute Resolution (ADR).
3. Identify some disputes which can be resolved through ADR.

## 15.3 ADVANTAGES AND PROCESS OF ADR

Since litigation is a costly affair it takes a lot of time to get a final decision from regular Court. Unfortunately litigation harms relationships and causes emotional stress to the litigants i.e. those people who are parties to the case. Participating in a civil suit is unpleasant and tiring. Expenses in payment of court fee, lawyers fee and fee for obtaining copies of court proceedings and orders involve lot of expenses. A party to a case may be required to come many times for proceedings in the case involving expenses in travel to and from the court, spending time in court and meeting other expenses. On the other hand, it has certain benefits too. The legal rights may be determined where interpretation of law is required. ADR allows parties to work together to solve the dispute without letting the relations getting sore. Thus, many disputes as to quality of in the commodity trades, rent of commercial property, consumer disputes and many small disputes can be resolved through ADR.

ADR proceedings are flexible. The parties have the freedom to choose the applicable law. They can be conducted in any manner and in the language to which the parties agree. The matter may be settled in few meetings thereby reducing expenses. No court fee is payable. No expenses are involved in obtaining copies of proceedings and reports.

A neutral third party can offer his/her services to the parties to have the dispute amicably resolved. The parties can choose the date and place where a meeting can be arranged as per their convenience. Parties can choose the fee payable to such third neutral person. The person is chosen by the consent of the parties.

The talks held in the meetings are kept confidential. While in court proceedings one party wins and other loses, but in a successful ADR by Mediation or Conciliation both parties emerge as winners. It improves communication and relationship between the parties.

A few examples are illustrated below to recognize as to what can be identified as ‘civil suit’ or dispute, which can be resolved amicably through ADR:

a) Where a water bottle or cold drink is sold at a higher value than its MRP (Maximum Retail Price) which is fixed by the Government of India;

b) Where a case is filed or is pending for partition of properties between members of the family;

c) Where the constructor is using poor quality of construction material but charging higher price;

d) Cases involving recovery of money; and

e) In case of partnership coming to an end, then the distribution of assets, determining of rights etc.

## INTEXT QUESTIONS 15.3

1. Which form of ADR was popular and prevalent in ancient India?
2. What is the full form of ADR?
3. What do you understand by the term "litigation"?
4. List the cases which can be resolved through ADR.
5. List the main advantages of ADR?
6. How many States are under the Guwahati High Court?

## 15.4 VARIOUS TECHNIQUES OF ADR, THEIR PROCESSES AND THEIR ADVANTAGES TO THE PEOPLE

Following are the main techniques of Alternatives Dispute Resolution (ADR) Mechanism.

A. Arbitration

B. Conciliation

C. Mediation

D. Pre-Trial Conciliation/Mediation

E. Negotiation/Discussion

F. Lok Adalat

G. Med Arbitration

H. Medola.

I. Mini-Trial

**Figure 15.2:** Office of the Centre for Alternative Dispute Resolution, New Delhi

## A. Arbitration

Where two or more persons agree that a dispute or potential dispute between them shall be decided in a legally binding way by one or more impartial persons in a judicial manner, that is, after recording evidence, the agreement is called an Arbitration Agreement. When, after a dispute has arisen, it is put before such person(s), the procedure is called as 'Arbitration', and the decision made is called "award". The person conducting the Arbitration proceeding is called an Arbitrator. The Arbitrator is appointed by the parties to the dispute and in case of any dispute about the appointment of the Arbitrator, the Court may be asked to appoint an Arbitrator. Where there is more than one Arbitrator the leading Arbitrator is called an Umpire, who is responsible for conducting the proceedings. The number of arbitrators can only be in odd number. The decision in such cases is decided by the majority of arbitrators,

Arbitration is a method whereby parties can resolve their disputes privately. In this mechanism parties can refer their case to an Arbitral Tribunal where arbitration proceedings are conducted.

Arbitration is preferred over traditional litigation because Arbitration is generally less expensive than litigation. It provides for faster resolution of dispute through flexible time schedule and simpler rules. A Court is burdened with a number of cases taken up for hearing every day. An arbitrator conducts only the proceedings referred to him by the parties.

Arbitration offers advantages that cannot be provided by litigation in courts. In many cases, a big advantage is that the Arbitrator or Arbitral Tribunal is an expert in the field of the dispute so the proceedings can be conducted without the intervention of lawyers or any other representative in an expeditious manner. Disputes in trade, rent of properties, partition of properties, partition of partnership firms and various consumer disputes can be resolved this way. The

'Award' of the Arbitrator is binding on the parties and may be enforced by the Courts. There is no appeal against the Award.

Virtually all the disputes can be resolved by Arbitration unless prohibited by law. The following cases cannot be decided by arbitration:-

a) Matters involving criminal questions, or question of public laws;

b) Matrimonial matters, like divorce, maintenance or custody of child;

c) Insolvency matters, like declaring a person as an insolvent;

d) Dissolution of an incorporated Company; and

e) Disputes relating to age.

## B. Conciliation

'Conciliation' is a process in which a third party assists the parties to resolve their dispute by agreement. The person assisting the parties is called Conciliator. The Conciliator is appointed by the consent of both the parties to the dispute. A Civil Court may also refer both the parties to the dispute to a Conciliator, A Conciliator may do so by expressing an opinion to the parties about the merits of the dispute to help the parties to reach a settlement. Conciliation is a compromise settlement between the parties with the assistance of a Conciliator. The Conciliator does not take any decision on the dispute before him. No evidence is recorded by the Conciliator nor are any arguments heard. Both the parties may discuss their respective points of view and with the help of the Conciliator resolve their differences, The proceedings before the Conciliator are confidential and do not have any bearing on the proceedings before the Court or before the Arbitrator regarding the dispute.

Conciliation is a voluntary and non binding process in comparison to Arbitration and Litigation in courts. Any party may terminate the conciliation proceedings at any time without assigning any reason.

The other important difference is that the parties control the process and outcome of the dispute. In the case Arbitration and litigation in Courts the parties have no role in the decision of the case by the Court or in the making of the Award by the Arbitrator. The Conciliator solemnly urges the parties for an amicable reconciliation.

## C. Mediation

'Mediation' is a process for resolving the dispute with the aid of an independent third person that assists the parties in dispute to reach a negotiated resolution. 'Mediation' is the acceptable intervention into a dispute of a third party that has no authority to make a decision. The person conducting the mediation

process is called a Mediator. The mediation process, like the Conciliation process is voluntary and is one more alternate way of resolving a dispute.

The Mediation proceedings are confidential, whether or not it results in the settlement and resolution of the dispute.

A Mediator assists the parties to reach an agreement for resolving the dispute. He/ She does not express his/ her opinion on merits of the dispute. On the other hand a Conciliator may express an opinion about the merits of the dispute to the parties.

In both processes, a third party is appointed to assist the parties to reach a settlement of their dispute. His/her function is only to try to break any deadlock and encourage the parties to reach an amicable settlement. A Mediator does not determine a dispute between parties.

## D. Pre-Trial Mediation

'Pre – Trial Mediation' process is a provision which has been introduced in Section 89 of The Code of Civil Procedure 1908 by virtue of Amendment Act 2002. It was introduced for pre-trial alternatives for settling the disputes. Pre-trial mediation is a settlement of disputes by efforts of the Courts before initiation of proceedings before it. The Code of Civil Procedure 1908 is an enactment which governs the procedure to be adopted in hearing and disposing off the civil suits.

Section 89 of The Code of Civil Procedure 1908 takes a special role especially in matters related to family members as its main objective is to resolve the family dispute without getting into bitterness of litigation.

## E. Negotiation

'Negotiation' is another form of ADR of resolving the disputes. The parties agree upon a course of action and bargain for advantage. Sometimes they try to adopt a creative option that serves their mutual interests. And because of its mutual advantages, people negotiate in almost all walks of life from home to the Court room. It is most common form of resolving a dispute and this process solves most disputes if negotiation fails, it is necessary to seek assistance of a neutral third party to reach a solution. Negotiation bargaining is a process in which both the parties cooperate and seek a solution which is beneficial to both sides. If and when negotiation succeeds, the parties sign a settlement agreement incorporating the terms and conditions of the agreement.

Our legal procedures also provide for settling criminal cases. However, the Court allows for settlement in criminal cases which are mostly trivial in nature. These cases are governed under section 320 of the Code of Criminal Procedure,

1973 and the cases settled under this provision are termed as compounded. The code specifies a category of cases which can be compounded. Code of Criminal Procedure, 1973 governs the procedure to be adopted in criminal cases Yet another provision available is Plea Bargaining under section 265 A of the Code of Criminal Procedure, 1973. Under this provision if the accused is willing to plead guilty for the offence alleged, and expresses his/her willingness to compromise the case with the victim then he/she can be allowed to do the same but only with the consent of the Court. All these provisions have been provided for to ease the work load of the Courts and speedy disposal of cases.

## F. Lok Adalat

'Lok Adalat' is yet another form of ADR created as per the requirements of people in particular areas. Camps of Lok Adalat were initially started at Gujarat in 1982 and now they have been extended to all over India. The main purpose of establishment of Lok Adalats is to diminish the heavy burden of pendency of cases in the Courts which were of petty nature. The seekers of justice are in millions and it is becoming rather a heavy burden on the courts to dispose off such matters keeping in view the ever increasing litigation.

Lok Adalats are organized with financial assistance from the Government and monitored by the Judiciary. Lok Adalats have set conciliation process in motion in India. Lok Adalats have assumed statutory recognition under the Legal Services Authority Act, 1987. The Section 19 of Legal Services Authorities provides for organization of Lok Adalats. Furthermore, it has the jurisdiction to determine and arrive at a compromise or settlement between the parties to a dispute. Every award of the Lok Adalat shall be deemed to be a decree of a civil court, or as the case may be, an order of any other civil court. Where a compromise is or settlement is arrived at, by Lok Adalat, the court fee paid in such cases shall be refunded. Similar is the condition in cases settled in the mediation cell referred through courts.

Lok Adalats is the most popular of Alternative Dispute Resolution (ADR) Techniques. Lok Adalats are providing less expensive and speedy Justice. Lok Adalats have assumed statutory recognition under the Legal Services Authority Act, 1987.

## G. Med. Arbitration

Another Alternative Dispute Resolution Technique is Med Arbitration. When a dispute is not resolved by 'Conciliation', then a third person is authorised by the parties to the dispute for resolving the dispute and the decision of the third person is binding on both the parties.

Med Arbitration is such a method which is not governed by Arbitration Act and these is no formality. The dispute is referred in an un-official way and the decision of the authorised third person is binding.

### H. Medola

'Medola' is another technique of Alternative Dispute (ADR) Mechanism. When it becomes impossible for arbitrator to reach any agreement then 'Medola' is used. It is such a method in which the person negotiating replaces the arbitrator and acts without bias. Such a person tries to reach at medium way during discussion and attempts for the 'Agreement' of the disputing parties over it. This is binding on the disputing parties.

### I. Mini–Trial

'Mini–Trial' is also an important alternative dispute resolution (ADR) technique. This is different from official trial of a suit. The disputing parties elect an independent person. Parties then present their contention before him/her, lay their arguments and produce evidence in their favour. The elected independent person after hearing both the parties, produces a 'Conclusion'. The disputing parties believe that such a person is impartial, honest and independent and he/she gives his/her opinion after hearing both the parties, Both the disputing parties, therefore, agree on that 'Conclusion'.

### Importance of Alternative Dispute Resolution (ADR) in India

Alternative Dispute Resolution System has great importance in India. Here courts have a huge number of pending cases which require a lot of time for their disposal by the courts as the procedure of courts is very lengthy.

It is very expensive also. On 25th February, 2002, the then Law Minister Mr. Arun Jetely told in the Parliament that there were as many as two crores and thirty-four cases lying pending in various courts for final disposition. Alternative Dispute Resolution (ADR) is needed for their quick resolution.

Increase in number of pending cases in the courts, delay in trial, extremely expensive litigation system of Courts are some of the reasons for the enactment of Arbitration and Conciliation Act, 1996.

Moreover, these is a large number of illiterate and poor people in India, who cannot afford the lengthy, technical and expensive system of courts and the Alternative Dispute Resolution (ADR) could be a boom for these people.

At present the need of the hour is to relieve the courts from the heavy burden of petty cases so that they can devote time to those cases which are more heinous and deal with criminals who are a threat to society.

It is important that a student should get the basic idea of having the benefit of avoiding litigation and opting for alternate dispute resolution.

A person must know that by wasting the time of the courts the expenses of the courts go up. These expenses are met by the Government of India from the taxes which are paid by the citizens of the country.

There are ways and means to resolve a dispute peacefully. The only thing is that we have to have communication with an open mind and try to avoid from approaching the courts.

In this lesson, you have learnt about the Alternate Dispute Resolution Procedures, namely Arbitration, Conciliation, Mediation, Negotiation and Lok Adalats.

## INTEXT QUESTIONS 15.4

1. Define an 'Arbitration Agreement'?
2. Whether you are 20 years old or 18 years, can only be decided by a panel of 3 Arbitrators. (Yes/No).
3. Give one word for "finishing work as soon as possible".
4. Is the Arbitration award binding on the parties? (Yes/No)
5. What is the basic difference between 'Mediation' and 'Conciliation'?
6. 'Mediation' is a process for resolving the dispute with the aid of an independent third person that assists the parties in dispute to reach a _____ resolution. (Fill in the blank)
7. When and where was the First Lok Adalat started?
8. What is the main purpose of Lok Adalat?
9. Who provides funds for organizing Lok Adalats?
10. Lok Adalats is the most popular Alternative Dispute Resolution (ADR). (True/False)
11. Define briefly the term 'Med Arbitration'.
12. What do you mean by 'Medola'?
13. *Mini-Trial* is different from official trial of a suit. (True/False)
14. (a) _____ is the most popular of Alternative Dispute Resolution (ADR) Techniques.
    (b) _____ is the process in which third party assists the parties to resolve their dispute by agreement.
    (c) _____ is a method whereby parties can resolve their disputes privately.
15. (a) Mini-Trial is different from official trial of a suit. (True/False)
    (b) Lok Adalats are organised with financial assistance from the government and monitered by the Judiciary. (True/False)

Notes

## 15.5 ROLE OF LEGAL SERVICE AUTHORITIES: LEGAL SERVICES AUTHORITY (AMENDED) ACT, 1994

Article 39-A of the Constitution provides that no person shall be devoid of Justice merely due to poverty or any other disqualification. It means that every person has the right to obtain Justice even is he/she is poor by anyway. This trending of the Constitution has been engulfed in various legal provisions and Judicial decisions. One of these is — Legal Services Authority Act, 1987 (amended in 1994 and is now Legal Services Authorities (Amendment) Act. 1994.)

This Act lays down detailed provisions for Legal Services. But it could not be implemented due to certain reasons. Later in 1994, various amendments were made in it and was implemented in the amended form

### Main Provisions of Legal Services Authorities (Amendment) Act, 1994

**(a) Creation of National Legal Services Authority:** Section 3 of the Act provides for the creations of a National Legal Service Authority for providing legal services, preparing effective and less expensive plans for availability of Legal Services, proper steps taken towards social Justice, increase in following of dispositions of matters by discussion, settlement and mediations, evolution of legal aid programmes from time to time, publicing of legal awareness etc.

Chief Justice of Supreme Court of India shall be its main guardian. It has one working chairman, who is appointed by the president after consultation with the chief Justice of India.

**(b) Creation of State Legal Services Authority:**

Like centre, a facility for the creation of State Legal Services Authority has been provided. According to section–G, Chief Justice of High Court of the Concerned State shall be its main guardian. It also has one working chairman who is appointed by the Governor of the State with the Consultation of Chief Justice of the High Court of the concerned state.

The main duty of State Legal Service Authority is to provide legal aid to the persons entitled to obtain legal aid, organise Lok Adalat, provide flow to legal aid programmes and implement the policies and directions of National Legal Service Authority.

**(c) Creation of District Legal Services Authority:**

Section–9 of the Act provides for the creations of one District Legal Services Authority for every District. Its chairman is the District. Few other Members are also there.

The main function of the District Legal Service Authority is perform the duties provided by the State Legal A Service authority for every district, organize Lok Adalats in the district, establish coordination between Several Legal Service Committees of the district and implement legal aid programmes.

### (d) Creation of Supreme Court Legal Aid Committee:

Section-3-A of the Act provides for the creation of Supreme Court Legal Aid Authority for the organisation of Lok Adalats and avail legal aid to the eligible parties for quick disposal of pending cases in the Supreme Court. The presiding Judge of the Supreme Court is the Chairman

### (e) Creation of High Court Legal Aid Committee:

Section 8–A of the Act provides for the creation of High Court Legal Aid Committees for the organisation of Lok Adalts, implementation of Legal aid and Legal Service programmes etc for the purpose of quick disposal of pending cases in the High Court. Its Chairman is a Judge of the High Court.

### (f) Creation of District/Block Legal Service Committees:

Section 11–A of the Act provides for the creation of District/Block Legal Service Committees for establishing Co-ordination between legal service related events in blocks, organize Lok Adalt and perform acts submitted by the District Legal /service Authority from time to time. Its official chairman is the Senior Civil Judge of the area.

### (g) Establishment of Legal Aid Fund:

A National Legal Aid Fund, State Legal Aid Fund and District Legal Aid Fund has to be established under section 15, 16 and 17 of the Act respectively for the fulfillment of expenses related to legal aid by National Legal Services Authority, State Legal Services Authority and the District Legal Services Authority.

### (h) Free Legal Aid:

As we have seen above, the main purpose of the Act is to provide free Legal aid to weaker Sections of the Society. For the achievement of this purpose, Section–12 of the Act mentions those persons who are entitled to free legal aid.

### (i) Lok Adalats:

The main characterstic of this Act to provide legal status to Lok Adalats. Section–19 of the Act provides 8 or the creation of Lok Adalats; Section 20 for the working of Lok Adalats; Section 21 for their Decree and Award. It is work mentioning that an 'Award' given by the Lok Adalt shall be equivalent to a 'Decree' of a civil court.

### (j) Permanent Lok Adalt:

Section 22–A of the Act provides for the establishment of permanent Lok Adalats. It is the result of the Legal Service Authority (Amendment) Act, 2002. A permanent Lok Adalat is a strong and powerful medium and a new concept for solving disputes by way of settlement.

A permanent Lok Adalat consists of one Chairman and five others members. Permanent Lok Adalat mainly solves disputes related to public welfare services. Section 22–(C) mentions the working of permanent Lok Adalats.

### (k) Public Utility Services:

A major achievement of the Act is to make provisions regarding public Utility Services. Section 22–(C) mentions these public utility services.

Thus, Legal Services Authority Act, 1987 (Amendment Act 1944) lays down important provisions regarding Legal Services, Legal Aid and Lok Adalats.

## ACTIVITY 15.1

Visit a 'Lok Adalat' in your District observe its working and enlist your observations.

## INTEXT QUESTIONS 15.5

1. List the main provisions of Legal services authorities (Amendment) Act, 1994.
2. Define the following:
   (a) Legal Aid Fund
   (b) Free Legal Aid.

## WHAT YOU HAVE LEARNT

Arbitration was very popular and prevalent in ancient India too, and 'Awards' were the decisions of panchayts, which were binding in nature.

Alternative Dispute Resolution (ADR) Mechanism refers to such methods of resolving a dispute which are alternatives for litigation in courts. ADRS processes are decision making processes that so not involve litigation. In India an alternative system is now available to the disputing parties including Arbitrations, Concilation, Mediation, Negotiation and Lok Adalats etc.

Arbitral institutions provide ADR services for quicker, less costly and consensual resolution of civil disputes outside the crowded court system. ADR promotes Communication between the disputing parties and enables them to solve their actual concerns behind the disputer.

The Legal Services Authority Act, 1987 (Amendment Act, 1994) makes important provisions for the creation of National Legal Services Authority, State Legal Services Authority, District Legal Services Authority, Supreme Court Legal Aid Committee, High Court, Legal Aid Committee, District/Block Legal Aid Committee, establishment of Legal Aid Fund and Free Legal Aid Fund me.

This Act has also provided legal status to the Lok Adalats and has also made provisions regarding public utility services.

## TERMINAL QUESTIONS

1. What is the need of having Alternative Dispute Resolution (ADR)?
2. What are the advantages of Alternative Dispute Resolution (ADR)?
3. List the different Techniques of Alternative Dispute Resolution (ADR)?
4. Describe the main provisions of Legal Services Authorities (Amendment) Act, 1994.
5. Explain the importance of Alternative Dispute Resolution (ADR) in India.
6. Define the following:
   (a) Permanent Lok Adalat
   (b) Public Utility Services
   (c) National Legal Services Authority
   (d) State Legal Services Authority

## ANSWER TO INTEXT QUESTIONS

### 15.1 and 15.2

1. The present Judicial System is extremely expensive and delaying. This lengthy and expensive process of litigation has reduced the faith of common people in the Judicial System being followed by the Courts and has given birth to Alternative Dispute Resolution (ADR) mechanism. ADR provides economic and speedy Justice.
2. ADR refers to such Methods of resolving a dispute, which are alternative for litigations in Courts.

3. Consumer complaints; Family Disputes; Property Disputes; Constrcution Disputes; and Business Disputes.

## 15.3

1. The popular and prevalent form of ADR in ancient was 'Arbitration'.
2. The full form of ADR is 'Alternate Dispute Resolution'.
3. The term 'litigation' means to fight a case in the Court of law
4. The disputes as to quality of the commodity, Business partnership, trades, rent of commercial property, consumer disputes and many small disputes can be resolved through ADR.
5. The parties have the freedom to choose the applicable law. They can be conducted in any manner and in the language to which the parties agree. The matter may be settled in few meetings thereby reducing expenses. No court fee is payable. No expenses are involved in obtaining copies of proceedings and reports. They can choose the time and place for the meetings. ADR provides speedy and economic Justice.
6. The seven States in North East India are under the High Court at Guwahati.

## 15.4

1. 'Arbitration Agreement' is an agreement where two or more persons in dispute agree that an impartial person can settle their dispute and they shall be bound by his/ her decision.
2. 'No'. The question as to the age of the parties can only be decided by the Court.
3. Expeditiously.
4. Yes, Arbitration Award is binding on the parties.
5. The basic difference between 'Mediation' and 'Conciliation' is that a Mediator does not expresses his/ her opinion on merits of the dispute. On the other hand a Conciliator may express an opinion about the merits of the dispute to the parties.
6. Negotiated.
7. 'Lok Adalat' were initially started in Gujarat in 1982.
8. The main purpose of establishment of Lok Adalats is to diminish the heavy burden of pendency of cases in the Courts which are of petty nature.
9. Funds for Lok Adalat are provided by the Government.
10. True.

11. 'Med-Arbitration' is such a method which is not governed by 'Arbitration' Act and there is no formality. The dispute is referred to a third person authorised by the disputing parties and the decision of the authorised third person is binding on both the parties

12. 'Medola' is another technique of ADR mechanism. When it becomes impossible for Arbitrator to reach any agreement, then 'Medola' is used. It is such a method in which the person negotiating replaces the Arbitrator and acts, without bios. Such a person tries to reach at medium way during discussion and attempts for the 'Agreement' of the disputing parties over it. This is binding or the disputing parties.

13. True

14. (a) Lok Adalat

    (b) Conciliation

    (c) Arbitration

15. (a) True

    (b) True

## 15.5

1. (a) Creation of National Legal Services Authority

   (b) Creation of State Legal Services Authority

   (c) Creation of District Legal Services Authority

   (d) Creation of Surpreme Court Legal Aid Committee

   (e) Creation of High Court Legal Aid Committee

   (f) Creation of District/Block Legal Service Committee

   (g) Establishment of Legal Aid Fund

   (h) Free Legal Aid

   (i) Lok Adalat

2. (a) **Legal Aid Fund.** The Legal Services Authority (Amendment) Act 1994 provided for Free Legend Aid Fund for providing free legal aid to establishment weaker sections of the Society.

   (b) **Free Legal Aid.** The Legal Services Authority (Amendment) Act, 1994 provided for free legal aid to weaker sections of the society.

Notes

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16

# LEGAL SERVICES AND LOK ADALAT

You might be aware of the fact that about 70 percentage of the people living in rural areas are illiterate and many of them are very poor. It is very difficult to reach the benefits of the legal process to the poor and to protect them against injustice. Therefore, it is urgently required to introduce dynamic and comprehensive legal service programme with a view to deliver justice to the poor and needy person. Legal aid is the provision of assistance to people otherwise unable to afford legal representation and access to the court system. Thus, legal aid is very significant in providing access to legal system. You might also understand that the normal court process is very costly and time consuming. It takes lot of money and resources which a poor person cannot afford. So, a different system of courts is created by a new law, which is called 'Lok Adalat'. These courts function in a different way than the formal system of courts. In criminal trials and prosecution, lengthy process is involved and the whole purpose of the prosecution is lost. So the concept of 'Plea Bargaining' has become very important in today's time. After the necessary changes in India's law, 'Plea Bargaining' has now got an importnat place in our criminal Judicial system.

## OBJECTIVES

After studying this lesson, you will be able to:

- explain the meaning of the concept of 'Legal Aid';
- know the historical background of Legal Aid Movement;
- discuss the main provisions of the Legal Services Authorities Act, 1987;
- appreciate the need of having 'Lok Adalat';
- explain the organisation and Juridiction of Lok Adalats;
- understand the concept of 'Plea Bargaining';

- identify the types of 'Plea Bargaining'; and
- appreciate the advantages of 'Plea Bargaining'.

## 16.1 HISTORY OF LEGAL AID SERVICES

The earliest Legal Aid movement appeared in the year 1851 when some enactment was introduced in France for providing legal assistance to the poor. In Britain, the history of the organised efforts on the part of the State to provide legal services to the poor and needy dates back to 1944, when Lord Chancellor, Viscount Simon appointed Rushcliffe Committee to enquire about the facilities existing in England and Wales for giving legal advice to the poor and to make recommendations as appear to be desirable for ensuring that persons in need of legal advice are provided the same by the State. Since 1952, the govenment of India also started addressing to the question of legal aid for the poor in various conferences of Law Ministers and Law Commissions. In 1960, some guidelines were drawn by the government for legal aid schemes. In different States legal aid schemes were floated through Legal Aid Boards, Societies and Law Departments. In 1980, a Committee at the national level was constituted to oversee and supervise legal aid programmes throughout the country under the chairmanship of Hon. Mr. Justice P.N. Bhagwati, then the Judge of the Supreme Court of India. This Committee came to be known as CILAS (Committee for Implementing Legal Aid Schemes) and started monitoring legal aid activities throughout the country.

Article 39-A of the Constitution of India provides that State shall ensure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disability. Articles 14 and 22(1) also make it obligatory for the State to ensure equality before law and a legal system which promotes justice on a basis of equal opportunity to all. Legal aid strives to ensure that constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the poor, downtrodden and weaker sections of the society.

Article 39-A of Constitution of India emphasises that free legal service is an inalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just, procedure for a person accused of an offence and it must be held implicit in the guarantee of Article-21 of the Constitution. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indignant situation and the State is under a mandate to provide

a lawyer to an accused person if the circumstances of the case and the needs of justice so requires, provided, of course, the accused person does not object to the provision of such lawyer.

## ACTIVITY 16.1

Write down the names of Courts functioning in your area.

Try to locate some poor persons who are fed up with the formal courts.

Find out some such persons who cannot afford to go to the Court.

## 16.2 LEGAL SERVICES AUTHORITIES ACT, 1987

### 16.2.1. Main Provisions of Law on Legal Aid

In 1987 Legal Services Authorities Act was enacted to give a statutory base to legal aid programmes throughout the country on a uniform pattern. The Legal Services Authorities Act, 1987 made drastic changes in the field of legal services. It is an Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is –

(a) a member of a Scheduled Caste or Scheduled Tribe;

(b) a victim of trafficking in human beings or begar;

(c) a woman or a child;

(d) a mentally ill or otherwise disabled person;

(e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or

(f) an industrial worker; or

(g) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State govenment, if the case is before a court other than the Supreme Court, and less than rupees twelve thousands or such other higher amount as may be prescribed by the Central govenment, if the case is before the Supreme Court.

(Rules have already been amended to enhance this income ceiling).

Legal Services Authorities after examining the eligibility criteria of an applicant and the existence of a prima facie case in his/her favour provide him/her counsel at State expense, pay the required Court Fee in the matter and bear all incidental expenses in connection with the case. The person to whom legal aid is provided is not called upon to spend anything on the litigation once it is supported by a Legal Services Authority.

## ACTIVITY 16.2.1

Identify such persons from your locality who are eligible for legal aid according to the Legal Services Authorities Act. Classify them in different categories, such as women, children, less income group, and victims of any natural disaster etc.

### 16.2.2 Authorities Under the Legal Services Authorities Act, 1987

The Legal Services Authorities Act, 1987 provides that the Central Government shall constitute a body to be called the National Legal Services Authority to exercise the powers and perform the functions conferred on , or assigned to, the Central Authority under this Act. A nationwide network has been envisaged under the Act for providing legal aid and assistance. National Legal Services Authority is the apex body constituted to lay down policies and principles for making legal services available under the provisions of the Act and to frame most effective and economical schemes for legal services. It also disburses funds and grants to State Legal Services Authorities and NGOs for implementing legal aid schemes and programmes. The Legal Services Authorities Act, 1987 provides for the constitution of 'State Legal Services Authority'. In every State a State Legal Services Authority is constituted to give effect to the policies and directions of the Central Authority (NALSA) and to give legal services to the people and conduct 'Lok Adalats' in the State. State Legal Services Authority is headed by the Chief Justice of the State High Court who is its Patron-in-Chief. A serving or retired Judge of the High Court is nominated as its Executive Chairman.

'District Legal Services Authority' is constituted in every District to implement Legal Aid Programmes and Schemes in the District. The District Judge of the District is its ex-officio Chairman.

'Taluk Legal Services Committees' are also constituted for each of the Taluk or Mandal or for group of Taluk or Mandals to coordinate the activities of legal services in the Taluk and to organise Lok Adalats. Every Taluk Legal Services Committee is headed by a senior Civil Judge operating within the jurisdiction of the Committee who is its ex-officio Chairman.

Authorities under the Services Authorities Act, 1987
↓
National Legal Services Authority
↓
State Legal Services Authority
↓
District Legal Services Authority
↓
Taluk Legal Services Authority

After the constitution of the Central Authority and the establishment of NALSA office towards the beginning of 1998, following schemes and measures have been envisaged and implemented by the Central Authority:-

(a) Laying down policies and principles for making legal services available under the provision of this Act;

(b) Framing the most effective and economical schemes for the purpose of making legal services available under the provisions of this Act;

(c) Utilising the funds at its disposal and make appropriate allocations of funds to the State Authorities and District Authorities;

(d) Taking necessary steps by way of social justice litigation with regard to consumer protection, environment protection or any other matter of special concern to the weaker sections, of the society and for this purpose, give training to social workers in legal skills;

(e) Organising legal aid camps, especially in rural areas, slums or labour colonies with the dual purpose of educating the weaker sections of the society as to their rights as well as encouraging the settlement of disputes through Lok Adalats;

(f) Encouraging the settlement of disputes by way of negotiations, arbitration and conciliation;

(g) Undertaking and promote research in the field of legal services with special reference to the need for such services among the poor;

(h) Monitoring and evaluate implementation of the legal aid programmes at periodic intervals and provide for independent evaluation of programmes and schemes implemented in whole or in part by funds provided under this Act;

(i) Providing grants-in-aid for specific schemes to various voluntary social service institutions and the State and District Authorities, from out of the amounts placed at its disposal for the implementation of legal services schemes under the provisions of this Act;

(j) Developing consultation with the Bar Council of India, programmes for clinical legal education and , promote guidance and supervise the establishment and working of legal services clinics in universities, law colleges and other institutions;

(k) Taking appropriate measures for spreading legal literacy and legal awareness amongst the people and , in particular, to educate weaker sections of the society about the rights, benefits and privileges guaranteed by social welfare legislations and other enactments as well as administrative programmes and measures;

(l) Making special efforts to enlist the support of voluntary social welfare institutions, working at the grass-root level , particularly among the Schedule Castes and Schedule Tribes, women and rural and urban labour; and

(m) Co-ordinating and monitoring the functioning of State Authorities, District Authorities, Supreme Court Legal Services Committee, High Court Legal Services Committees, Taluk Legal Services Committees and voluntary social service institutions and other legal services organisations and give general directions for the proper implementation of the legal services programmes.

Legal Aid Counsel have been provided in most of the courts of the Magistrates in the country to provide immediate legal assistance to those prisoners who are not in a position to engage their own counsel.

The legal aid is being given by legal aid advocates to the millions of this country who live below poverty line in tribal, backward and far flung areas and who look to Legal Services Authorities for help and support in resolving their legal problems. When involved in litigation they very often feel that they are fighting an unequal battle in which the party that has better financial resources can secure more able legal assistance. These poor and weaker sections must not remain under the impression that they are getting comparatively inferior legal assistance. Legal services authorities must revise the payment schedule for legal aid panel advocates and also compress the panels so that panel advocates get more work and better remuneration from legal services authorities and thus get encouraged to render effective legal assistance to aided persons.

NALSA has also called upon State Legal Services Authorities to set up legal aid cells in jails so that the prisoners lodged therein are provided prompt and efficient legal aid to which they are entitled by virtue of Legal Services Authorities Act, 1987.

## ACTIVITY 16.2.2

Find out and list the legal services authorities in your locality. If you reside in Delhi, you can find all level of legal services authorities, and if you reside in a State capital, you can find State and District level legal services authorities, and if you reside in a district, you may find at least or maximum two legal services authorities.

## 16.3. LOK ADALAT

'Lok Adalat' is a system of conciliation or negotiation. It is also known as 'people's court'. It can be understood as a court involving the people who are directly or indirectly affected by the dispute or grievance. 'Lok Adalat', established by the government settles dispute through conciliation and compromise. The First 'Lok Adalat' was held in Chennai in 1986. 'Lok Adalat' accepts the cases which could be settled by conciliation and compromise and pending in the regular courts within their jurisdiction.

**Figure 16.1:** Lok Adalat

### 16.3.1 Need of Lok Adalats

As we know that justice delayed is justice denied. This statement becomes true if we see the backlog of pending cases before courts of different hierarchy. It resulted into delay justicing in India. Mounting arrears of cases has brought the judiciary and the judicial process at the verge of collapse. In this given state of affairs the mechanism of Lok Adalats is the only option left with the people to resort to for availing cheap and speedy justice. Lok Adalats effectively deal with the magnitude of arrears of cases. 'Lok Adalat' has in view the social goals of ending bitterness rather than pending disputes restoring peace in the family, community and locality.

Person
- Formal Court ⟶ wastage of time & money
- Lok Adalat ⟶ saves time as well as money

So 'Lok Adalat' is favourable to poor sections of the society.

### 16.3.2 Statutory foundation of Lok Adalats

Under Article-39 A of the Constitution of India, the Parliament has enacted the Legal Services Authorities Act, 1987 with the legislative intent to constitute various legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities

and to organise 'Lok Adalats' to ensure the operation of the legal system which promotes justice on the basis of equal opportunity. The Act was passed to advance the Constitutional mission of social justice by creating legal services authorities and to organise 'Lok Adalats' to provide cheap and quick justice to the deprived and the destitute. The Act has conferred statutory status to 'Lok Adalats' for the first time through the parliamentary legislation, although the institution had the glorious socio-cultural heritage in India.

**Do you know**

There are large numbers of pending cases before different courts. The position of arrears is quite alarming in the High Courts. It is estimated that around 20,00,000 cases pending in various High Courts in India. All these shows that our judicial efficiency has been deteriorating and it has become almost impossible to render justice to the people at large.

### 16.3.3 Organisation of Lok Adalats

Every State Authority or District Authority or Supreme Court Legal Services Committee or every High Court Legal Services Committee or Taluk Legal Services Committee may organize Lok Adalats. Lok Adalats are to consist of three members – a sitting or retired judicial officer, a member of the legal profession (advocate, law officer, and law teacher) and a social worker, preferably women. The Act and regulations require the secretary of the legal services authority or committee to associate students, social activists and voluntary organisations in the community for facilitating the successful conduct of 'Lok Adalats'.

### 16.3.4 Jurisdiction and Award of Lok Adalats

Lok Adalats are intended to arrive at compromises and settlements. In doing so, it has the power of a civil court in summoning and examining witnesses, discovery of documents, recording of evidence on affidavits and requisitioning of public records. Further, it is open to Lok Adalats to specify its own procedure and it is considered judicial proceedings.

Whenever a settlement is reached, an 'Award' is made which is deemed to be a 'Decree' of a civil court. It is to be written down in simple and clear terms. No appeal is permissible against such awards which are deemed final. If no compromise is reached, the same goes back the court.

Many people saw the Lok Adalats as a measure to divert litigation from formal courts and tribunals and a convenient strategy to reduce the mounting arrears of cases in the formal court system. The insurance companies that found the

compensation amounts settled through Lok Adalats in motor accident cases economically and administratively convenient started opting for the Lok Adalat in preference to the Tribunals.

## INTEXT QUESTIONS 16.1

1. Why do we need 'Lok Adalats'? Discuss briefly the statutory foundation of Lok Adalats.
2. Have you ever attended any 'Lok Adalat' which was conducted in your district? If yes, then tell your experience.
3. Fill in the blanks—
   (a) Lok Adalats are to consist of three members – a sitting or retired ....., a member of the ..... and a social worker, preferably women.
   (b) There is .....appeal against the award delivered by 'Lok Adalat'.

## 16.4. CONCEPT OF PLEA BARGAINING

In a Democratic Country like India, judiciary plays a vital role in establishing a state of justice. Justice is desired by each and every person on this earth. But as we all know that justice delayed is justice denied, so it is a matter of concern that how many people actually get justice in due time. There are large numbers of cases which are pending before different courts. The problem of backlog of cases has been haunting the Indian courts for a long time.

Thus, it is very necessary that some sort of system is adhered to so as to speed up the trial process and relieve the courts from heavy backlog of cases. With such a large population it is quite obvious that at least thousands of crimes are committed almost every day throughout the country. Thus, it is all the more obvious that with such a rate of criminal cases piling into the courts, the available workforce falls very short of the expectations. Apart from that there are several appeals which are preferred from the trials which furthermore increase the case numbers in the courts. In such a scenario it becomes a matter of concern as to how to control this problem.

### 16.4.1 Plea Bargaining- Meaning

"Plead Guilty and ensure Lesser Sentence" is the shortest possible meaning of Plea Bargaining. Plea Bargaining fostered by the Indian Legislature is actually the child of the West. The concept has been very much alive in the American System in the 19th century itself. Plea Bargaining is so common in the American System that every minute a case is disposed in the American Criminal Court

by way of guilty plea. England, Wales, Australia and Victoria also recognises 'Plea Bargaining'.

'Plea Bargaining' can be defined as "Pre-Trial negotiations between the accused and the prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecution". It gives criminal defendants the opportunity to avoid sitting through a trial risking and conviction on the original more serious charge. For example, a criminal defendant charged with a theft charge, the conviction of which would require imprisonment in state prison, may be offered the opportunity to plead guilty to a theft charge, which may not carry jail term.

## Types of 'Plea Bargaing'

'Plea Bargaining' may be divided into three broad types: (a) 'Charge Bargaining', (b) 'Sentence Bargaining', and (c) 'Fact Bargaining'.

(a) 'Charge Bargaining' is a common and widely known form of plea. It involves a negotiation of the specific charges or crimes that the defendant will face at trial. Usually, in return for a plea of guilty to a lesser charge, a prosecutor will dismiss the higher or other charge(s). For example, in return for dismissing charges for first-degree murder, a prosecutor may accept a guilty plea for manslaughter (subject to court approval).

(b) 'Sentence Bargaining' involves the agreement to a plea of guilty in return for a lighter sentence. It saves the *prosecution* the necessity of going through trial and proving its case. It provides the defendant with an opportunity for a lighter sentence.

(c) 'Fact Bargaining' is the least used in a *prosecution* in which the Prosecutor agrees not to reveal any aggravating factual circumstances to the court because that would lead to a mandatory minimum sentence or to a more severe sentence under sentencing guidelines.

**Do you know**

'Plea Bargaining' in the United States is very common; the vast majority of criminal cases in the United States are settled by Plea Bargaing rather than by a jury trial. In the United States 95% convictions for killing of human beings are settled on the basis of plea bargaining.

## INTEXT QUESTIONS 16.2

1. Define 'Plea Bargaining'.
2. List various types of 'Plea Bargaining'.

## 16.5 PLEA BARGAINING IN CRIMINAL MATTERS

### 16.5.1. Recent Incorporation of Plea Bargaining in Criminal Judicial System

Plea Bargaining , basically meant to reduce the time frame of criminal trials. The Supreme Court was very much against the concept of Plea Bargaining before its introduction. According to the Supreme Court, the court has to decide cases on its merit. If the accused confesses his/her guilt, even then appropriate sentence is required to be implemented. The court viewed that mere acceptance or admission of the guilt should not be a ground for reduction of sentence, nor can the accused bargain with the court that as he/she is pleading guilty his sentence should be reduced. Despite strict opposition by the Supreme Court, the government found it comfortable to introduce this concept. Long list of pending cases before the criminal courts was cited as the reason for the enactment of this provision. If a person accepts his guilt, then the time of the prosecution is saved, which can be then properly utilised for proving more serious offences.

Plea Bargaining is applicable only in respect of those offences for which punishment of imprisonment is upto period of seven years. It does not apply where such offence affects the socio-economic condition of the country or has been committed against women or committed against a child below the age of 14 years.

The application for Plea Bargaining should be filed by the accused voluntarily before the court which is trying the offence. The complainant and the accused are then given time by the court to work out satisfactory disposition of the case. The court may reduce the sentence to 1/4th if the accused pleads guilty. There shall be no appeal in the case where judgment has been pronounced by the court on the basis of plea bargaining.

Plea Bargaining has emerged and gained acceptance in the legal community only in recent decades. The Criminal Law (Amendment) Bill, 2003 which was introduced in the parliament attracted enormous public debate. Despite this huge hue and cry, the government found it acceptable and finally section 265-A to 265-L have been added in the Code of Criminal Procedure so as to apply the plea bargaining.

### 16.5.2 Advantages of Plea Bargaining

A significant feature of method of Plea Bargaining is that it helps the Court and State to manage the case loads. It reduces the work load of the prosecutors enabling them to prepare for gravest cases by leaving the effortless and petty offences to settle through plea bargaining. It is also a factor in reforming the offenders by accepting the responsibility for their actions and by submitting them voluntarily before law without having an expensive and time consuming trial. In case wherein the prosecution is weak, if trial is concluded, for want of proper witnesses or evidences and the ultimate result may be an acquittal, the

prosecution will have a chance to prove the accused as guilty by co-operating with the accused for a plea bargaining. An intelligent prosecutor may agree for a plea bargaining of an insignificant accused to collect evidence against other graver accused. Normally, in cases wherein aged or women witnesses have the vital role to prove a charge against the accused, their death or non cooperation, may be a real cause for adverse conclusion of the case. Here the prosecution avoids a chance of acquittal and the accused avoids a chance of conviction for more serious charges with higher punishments. From the angle of victim also, plea bargaining is a better substitute for his/her ultimate relief, as he/she can avoid a lengthy court process to see the accused, be convicted. The system gives a greater relief to a large number of undertrials lodged in various jails of the country and helps reduce the long pendency in the court.

There are some other supporting factors of 'Plea Bargaining' which fall into three main categories. First, some jurists maintain that it is appropriate as a matter of sentencing policy to reward defendants who acknowledge their guilt. They advance several arguments in support of this position, notably, that a bargained guilty plea may manifest an acceptance of responsibility or a willingness to enter the correctional system in a frame of mind that may afford hope for rehabilitation over a short period of time than otherwise would be necessary. A second view treats 'Plea Bargaining', not primarily as a sentencing device, but as a form of dispute resolution. Some plea bargaining advocates maintain that it is desirable to afford the accused and the state of opinion of compromising factual and legal disputes. They observe that if a plea agreement does not improve the positions of both the accused and the State, one party or other would insist upon a trial.

Finally, some observers supports 'Plea Bargaining' on grounds of economy or necessity. Viewing plea negotiation less as a sentencing device or a form of dispute resolution than as an administrative practice, they argue that society cannot afford to provide trials to all the accused who would demand them if guilty pleas were unrewarded. At least, there are more appropriate uses for the additional resources that an effective 'Plea Bargaining' could save.

## INTEXT QUESTIONS 16.1

1. What are the advantages of 'Plea Bargaining'?

## ACTIVITY 16.5

1. Make two groups of students of your study center and organise a debate. One group will favour the 'Plea Bargaining' and other against it. Note down the main points of discussion.

## WHAT YOU HAVE LEARNT

- Legal Aid and Services are the provisions which a poor can avail of. Even if a person is poor and illiterate, justice is secured for him/her. Now money is no more obstacle to get justice for poor.
- First of all, legal aid services were provided by France Government in 1851. Further, in 1944, England Government made effort to provide legal assistance to poor and needy persons. Our Constitution also secures legal aid and services for the poor section of the society. This benefit is provided under Art. 39A of our Constitution. The Legal Services and Authority Act was enacted in 1987. This Act has been enacted in furtherance to secure the benefit provided in Art. 39 of Our Constitution of India.

  This Act defines – who are entitled for legal aid, and under which circumstances they are entitled.

  This Act provides for the constitution of four Level Legel Authorities–

  (1) National Legal services Authority

  (2) State Legal Services Authority

  (3) Distric Legal Services Authority

  (4) Taluk Legal Services Authority
- 'Lok-Adalat' means people's court. This is a system where people can solve their disputes or problems on the basis of conciliation or negotiation. If an aggrieved person will go court to get justice, he/she has to spend lot of time and money. 'Lok Adalat System' will save the time as well as money of the aggrieved.
- 'Plea Bargaining' concept is taken from the American system. The adoption of this concept in American system has speeded up the disposal of cases. Plea bargaining means the accuse is ready to plead guilty but in exchange for certain concessions by the prosecution.

  Plea bargaining can be made at three level

  (1) 'Charge Bargaining' – Plea Bargaining at the time of framing of charges.

  (2) 'Sentence Bargaining' – Bargaining involves the agreement to plea of guilty in return for a lighter sentence.

  (3) 'Fact Bargaining' – Bargaining in which the Prosecutor agrees not to reveal any aggravating factual circumstances to the court because that would lead to a mandatory minimum sentence.

In different States of India, Legal Aid Schemes have been floating through Legal Aid Boards, Societies and Law Departments. In 1987, Legal Services Authorities Act was enacted to give a Statutory base to Legal Aid progammes throughout

the country on a uniform pattern. 'Lok Adalat' which is system of conciliation or negotiation and which is also known as 'People's Court', settles disputes through conciliation and compromise. 'Plea Bargaining' has become very important in today's time and has, therefore, got an important place in our Criminal Judicial System.

## TERMINAL QUESTIONS

1. Explain the main provisions of Legal Services Authority Act, 1987.
2. Name the Authorities which are constituted under the Legal Services Authority Act, 1987. What are their functions?
3. "The Lok Adalat System is beneficial for the poor sections of the society." Explain.
4. Explain briefly the jurisdiction and award of 'Lok Adalat'.
5. What is the meaning of 'Plea Bargaining'? Write down the advantages of Plea Bargaining.
6. Match the right in column 'A' with their corresponding duties in column 'B'.

| A | B |
|---|---|
| (a) The Legal Services Authority Act, 1987, provides for the constitution of | (a) reduce the case loads |
| (b) Lok Adalat is known as | (b) can organise Lok Adalat |
| (c) State Authority | (c) from American system |
| (d) 'Plea Barganing' concept is taken | (d) people's court |
| (e) 'Plea Bargaining' helps the Court to | (e) National Legal services Authorities. |

## ANSWER TO INTEXT QUESTIONS

### 16.1

**1. Why Lok Adalat**

As we know that justice delayed is justice denied. This statement is true if we see the backlog of pending cases before courts of different level. It resulted into delay justicing in India. Mounting arrears of cases has brought the judiciary and the judician process at the veige of collapse. In this given state the Lok adalat in the best option with the people to resort for availing cheap and speedy justice. Lok adalat accepts the case which is settled by

conciliation and compromise. The Lok adalat will save time as well as money of the poor persons.

**Statutory Foundation–**

Art. 39-A of the Constitution of India the Parliament has enacted the Legal Services Authorities Act, 1987 with the legislative intent to constitute various legal services authorities to provide free and competent legal service to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities and to organise Lok Adalat to ensure that the operation of the Legal system promotes justice on the basis of equal opportunity.

The Act was passed to advance the constitutional mission of social justice by creating legal services authorities and to organise Lok Aadalats to provide cheap and quick justice to the deprived and the destitute.

2. Yes, My experience of attending the 'Lok Adalat' was very exciting.
3. (a) (i) Judicial Officier

   (ii) Legal Profession

   (b) no

## 16.2

1. 'Plea Bargaining' can be defined as "Pre-Trial negotiations between the accused and the prosecrition during the accused agrees to pleat guilty in exchange of certain concessions by the prosecution.
2. Plea Bargaining may be divided into three broad types. These are (a) Charge Bargaining (b) Sentence Bargaining (c) Fact Bargaining.

## 16.3

1. 'Plea Bargaining' helps the Court and State to manage the case loads. It reduces the wrok load of prosecutors enabling them to prepare for the gravest cases by leaging the petty offences to settle through 'Plea Bargaining'. It is also a factor in reforming the offenders by accepting the responsbility for before the law with out having an expensive and time consuming trial.

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17

# THE CONSTITUTION OF INDIA – ITS NATURE

A Constitution is a set of laws and rules, setting up the machinery of the government of a State which defines and determines the relations between the different institutions and areas of the government, the executive, the legislature and the judiciary, the central, the regional and the local governments. Every Constitution aims to build up a governmental structure based upon certain basic and well established principles. Although some of these principles are common to most of the Constitutions, there are others which vary from Constitution to Constitution. The Constitution of India is not an exception to this rule and it has its own basic principles.

The Constitution of India is the supreme law of the land. It lays down the frame-work defining fundamental political principles, establishes the structure, procedures, powers and duties of government and spells out the fundamental rights, directive principles and duties of the citizens. It is the largest written

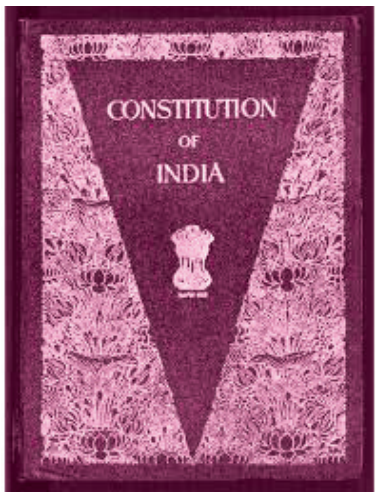


**Figure 17.1** The Constitution of India

Constitution of any sovereign country in the world, containing more than 395 Articles and divided into 24 parts and 12 schedules passed and adopted by the Constituent Assembly on 26th November, 1949. It came into effect on 26th January, 1950. The Constitution declares the Union of India a Sovereign, Socialist, Secular, Democratic Republic, assuring its citizens of Justice, Equality and Liberty and endeavors to promote Fraternity among them all.

## OBJECTIVES

After studying this lesson you will be able to:

- understand the nature of the Indian Constitution;
- describe the composition of the Constituent Assembly and the role of the Drafting Committee as well as the objectives of the Constitution;
- appreciate the importance of the 'Preamble' of the Constitution of India;
- describe the main characteristics of the Constitution of India;
- distinguish between the written and the unwritten Constitution; and
- Identify the Federal and Unitary character of Indian Constitution.

## 17.1 THE NATURE OF THE INDIAN STATE

The main characteristics of the Indian State are following which highlight the nature of the State itself:

(i) **Liberal – Democratic State:** The model of a liberal – democratic State signifies a political system in which democracy or 'the rule of Law' prevails to make the regime 'legitimate' in the real sense of the term. The machinery of government is run by the chosen representatives of the people who are accountable to them for their policies and actions. The liberal democratic State is based on the assumption that the government is not an end in itself but a means for the realisation of the greatest good of the greatest numbers. Besides, the authority of the government is not absolute but limited by the laws.

All this brings us to the point that India stands for the preservation of the entire paraphernalia of a Liberal – Democratic State. It has been correctly asserted that the Constitution facilitates for adult franchise, periodic, elections, representative and responsible government, independent judiciary, rule of law and separation of powers.

(ii) **Federal State:** Mahatma Gandhi talked about decentralisation of powers of the State in the Indian context. All the powers of economic development and social change are vested in the State. The State has been bestowed with vast powers in the field of agriculture as well as industrial development. In the words of Rajni Kothari, 'the ideology of a stronger and centralised State and the cult of personality have brought the country close to a centralised State'.

(iii) **A Welfare State:** The framers of the Indian Constitution incorporated many provisions to make India a Welfare State. The basic aims of a Welfare State were clearly included in the Preamble to the Constitution, and virtually in all provisions contained in Part IV of the Constitution, containing the Directive Principles of State Policy. Article 38 states : "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of national life."

(iv) **Caste-ridden Society:** A system of hierarchical social organisation was evolved and practiced by our ancestors from the beginning of the early civilisation, which is the basic foundation of India's social structure. The institution of caste determines a person's place right from the day he/she is born, and inherits his occupation from his father and, in turn, passes it on to his descendants. What is significant about the caste system is that castes are forced not only among the Hindus, but also to some extent among the Indian Muslims, Christians, Sikhs, Jains and Jews etc.

(v) **Multi-religious Society:** There is no homogeneity on the basis of religion. The Indian population is divided into Hindus, Muslims, Buddhist, Paris and Christians. It is a fact that there is not a single community which is not diverse. Even the personal laws are not uniform.

Besides these social, cultural, religious and racial diversities, India remains a largely unified society. It is surprising that beneath the bewildering diversity of religion, language and customs of this vast country, the underlying unity is remarkable. India is a political entity, every part of which is governed by the same Constitution.

## INTEXT QUESTIONS 17.1

1. What is meant by a Welfare State?

2. Mention any two characteristics of the Indian State.

## 17.2 THE CONSTITUENT ASSEMBLY

A Constituent Assembly was constituted for formulating or adopting a new Constitution. The concept of a Constituent Assembly implies the right of people to determine their own future and decide the nature and type of policy under which they would like to live.

The enormous task of drafting India's Constitution was taken up by the will of the Indian people. The Constitution for India was drafted during the years from December 1946 to November 1949. During this period, it held eleven sessions and performed real work for 165 days. The historic document –free India's Constitution was passed and adopted by the Assembly on November 26, 1949 and it came into force on January 26, 1950.

In all, the Constituent Assembly was to have 389 members. As many as 296 of them were to the elected from British India and 93 were to be representatives of the native states. The members of the Constituent Assembly were indirectly elected by the members of the then existing Provincial Assemblies. In addition members were also nominated by the princely states. For elected members seats were reserved on communal basis. India was one and undivided when the Constituent Assembly was constituted. However, at the time of independence the Muslim League bycotted the Assembly. As a result, members representing the areas included in Pakistan ceased to be members of India's Constituent Assembly. Hence, out of 296 elected members only 229 remained as on 31st December 1947. The Constituent Assembly was dominated by members belonging to Congress. Within the Congress, mostly all the leaders of the freedom movement were members of the Assembly. Out of the 229 members of the Constituent Assembly 192 belonged to Congress, 29 to Muslim Leagne, 1 Akali and seven were independent members.

The First meeting of the Constituent Assembly was presided over by Dr. Sachidanand. Later Dr. Rajendra Prasad was elected the President of Constituent Assembly. The members of the Constituent Assembly were not selected purely on party basis, but were drawn from all walks of life and represented almost every section of the Indian population. The moving spirit of the Assembly was Jawaharlal Nehru, the first Prime Ministers of Free India. In the opinion of Subhash Kashyap, "While Nehru fashioned its structure and shape, most significantly, Nehru gave to the Constitution of India its spirit and soul, its philosophy and its vision".

### 17.2.1 Committees of the Constituent Assembly

The Constituent Assembly had a total of more than fifteen Committees, prominent of which were : the Drafting Committee, the Union Power Committee,

the Union Constitution Committee, the Advisory Committee on Minorities and Fundamental Rights, the Committee on Chief Commissioner's Provinces, the Committee on Financial Provisions of the Union Constitution and the Advisory Committee on Trible Areas. These Committees submitted their reports between April – August, 1948 which were considered by the Constituent Assembly. On the basis of these decisions, the final shape and form was given by Dr. B. R. Ambedkar and his colleagues in the Drafting Committee.

The Constituent Assembly appointed a Drafting Committee on 29th August, 1947 to consider the Draft Constitution. Dr. B. R. Ambedkar was appointed its Chairman and was assisted by some other members. The Drafting Committee under the Chairmanship of Dr. B. R. Ambedkar embodied the decisions of the Constituent Assembly with alternative and additional proposals in the form of a 'Daft Constitution of India' was first published in February 1948. The Draft Committee took less than six months to prepare the Draft.

## INTEXT QUESTIONS 17.2

**Fill in the blanks.**

1. The chairman of Drafting Comittee was ..... .
   (Pt. Jawaharlal Nehru/Dr. Rajendra Prasad/Dr. Ambedkar)
2. The chairman of the Constituent Assembly was ..... .
   (Dr. Rajendra Prasad/Dr. B. R. Ambedkar)

## 17.3 OBJECTIVES OF THE CONSTITUTION

Quite a good number of political thinkers are of the opinion that the Constitution of independent India was framed in the background of about two hundred years of the colonial rule, a mass based freedom struggle, the national movement, partition of the country and spread of communal violence. The framers of the Constitution were concerned about the aspirations of the people, integrity and unity of the country and establishment of a democratic society. Different members of the Constituent Assembly held different ideological views. Some of them were inclined to socialist principles, still others laid emphasis on Gandhian thinking. Most of them agreed to give India a 'Constitution' which will fulfill the cherished ideals of the people.

As a result, conscious efforts were made to have consensus on different issues and principles to avoid disagreements and conflicts. This consensus came out in the form of the 'Objective Resolution' moved by Pandit Jawaharlal Nehru in the Constituent Assembly on 17 December, 1946 which was almost

unanimously adopted on January22, 1949. In the light of these 'Objectives' the Constituent Assembly completed its task by November 26, 1949. The Constitution was enforced with effect from January 26, 1950. From this auspicious day India became a Republic. Exactly twenty years before the first independences day was celebrated on January 26, 1930 as decided by the Lahore Session of the Congress on December 1929. Hence, January 26, was decided as the day to enforce the Constitution of India. Pandit Jawaharlal Nehru commenting on the aforesaid Resolution said: 'Objective Resolution' is something more than a resolution. It is a declaration, a firm resolve, a pledge, an undertaking and for all of us a dedication.

## INTEXT QUESTIONS 17.3

1. "The Objective Resolution was moved by Pt. Jawaharlal Nehru on 17th Dec. 1946." (True/False)
2. "Maintaining the Integrity and Unity of the country was one of the main objective of the framers of the Indian Constitution." (True/False)

## 17.4 THE PREAMBLE OF THE INDIAN CONSTITUTION AND ITS IMPORTANCE

The Preamble to a Constitution is expected to embody the fundamental values and the philosophy on which the Constitution is based and the aims and objectives the founding fathers enjoined to strive to achieve. In other words Preamble is a preliminary or introductory statement in speech or writing. It has been rightly stated that 'Preamble' is like an introduction or preface of a book. It explains the purposes and objectives with which the document has been written. As such the 'Preamble' provides the guidelines of the Constitution.

### 17.4.1 Preamble

We, the people of India, having solemnly resolved to Constitute India into a 'Sovereign, Socialist, Secular, Democratic Republic' and to secure to all its citizens : Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation; in our Constituent Assembly this twenty – sixth day of November, 1949 do hereby adopt, enact and give to ourselves this Constitution.

The 'Preamble', in brief, explains the objectives of the Constitution in two ways: One, about the structure of the governance and the other, about the ideals to be achieved in independent India. It is because of this, the Preamble is considered to be the key of the Constitution. A motion was adopted by the Assembly that' the Preamble stands a part of the Constitution'. It would be pertinent to look at what do these objectives mean and how have these been reflected in the Constitution.

The opening and closing words of the Preamble, "We the people of India, adopt, enact and give to ourselves this Constitution" convey that the Constitution emanated from the people and the sovereignty under the Constitution was in the people.

The type of government assured to the people of India by the Constitution was described in the Preamble as Sovereign, Socialist, Secular, Democratic Republic.

**'Sovereignty'** is one of the foremost element of any independent State. It means absolute independence i.e. a government which is not controlled by any other power: internal or external. A country cannot have its own Constitution without being sovereign. Hence, India is a sovereign country. It is free from external control. It can frame its own policies as well as it is free to formulate its own foreign policy.

The word **'Socialist'** was not there in the Preamble in the Constitution originally. It was added by the 42nd Amendment in 1976. The term 'Socialist' is somewhat controvercial as it means different things to different persons. In our Constitution it has been used in the context of economic planning. The use of the word 'Socialist' implied acceptance of the State's major role in economy. It also means commitment to attain the ideals such as removal of inequalities, provision of minimum basic needs to all, equal pay for equal work, avoidance of concentration of wealth and means of production in a few hands. Combining the ideals of political, social and economic democracy with that of equality and fraternity, the Preamble aims to establish what Mahatma Gandhi described as "The Indian of my dreams … an India, in which the poorest shall feel that it is their country in whose making they have an effective voice … an India in which all communities shall live in perfect harmony … where women will enjoy the same rights as men"

The unity and fraternity of the people of India, professing a numbers of faiths has been sought to be achieved by enshrining the ideal of a **'Secular State'**, which means that the State protects all religions equally and does not uphold any religion as the State religion. In other words 'India is neither religious, nor irreligious nor anti-religious.' It implies that in India there will be no 'State

religion'- the State will not support any particular religion out of the public fund. It highlights that the State shall have no religion of it own. All persons shall be equally entitled to freedom of conscience and the right to profess, practise and propagate any religion of his/her choice. This has two implication (a) every individual is free to believe in, and pracice, any religion he/she belongs to and (b) State will not discriminate against any individual or group on the basis of religion.

The term **'Democratic'** is very comprehensive. In a narrow political sense, it refers only to the form of government, a representative and responsible system under which those who administer the affairs of the State are chosen by the electorate and accountable to them. However, in the broadest sense, it embraces in addition to political democracy also social and economic democracy. The last line of the Preamble says "…. hereby adopt, enact and give to ourselves this Constitution". In fact, the democratic principles of the country flow from the last line of the Preamble. Democracy is generally known as a government of the people, by the people and for the people.

The term **'Republic'** implies 'an elected Head of the State'. A democratic State may have an elected or a hereditary head. The British monarch, a hereditary ruler, is no hindrance to the latter type. There, the monarch, a hereditary ruler is no hindrance to democratic government as the real rules of the State is in the hands of the representative of the electorate. Under a Republic form, on the contrary, the Head of the State, single or collective, is always elected for a prescribed period. For example in U.S.A., the Head of the State and Chief Executive (the President) is elected for a period of four years. Similarly, in Switzerland, a collegium of seven members is elected for a term of four years to constitute the executive.

The Preamble proceeds further to define the objectives of the Indian political system. There are four objectives : **Justice, Liberty, Equality and Fraternity**. It has correctly been said that the struggle for freedom was not only against the British rule but also was to usher in an era of restoring the dignity of men and women, removal of poverty and to end all types of exploitation. Such strong motivations and cherished ideals had promoted the framers to lay emphasis on the provisions of the aforesaid four objectives.

**Justice** implies a harmonious reconcilement of individual conduct with the general welfare of society. The essence of justice is the attainment of the common good. It embraces, as the Preamble proclaims, the entire social, economic and political spheres of human activity. In other words justice promises to give people what they are entitled to in terms of basic necessities or rights to food, clothing, housing, participation in the decision making and living with dignity

as human beings. The Preamble not only covers various dimensions of justice but also grants the political justice in the form of **'universal adult franchise'** or 'representative form of democracy'.

**Liberty:** The term is used in the 'Preamble' not only in a merely negative sense but in a positive sense also. It signifies not only the absence of any arbitrary restraint on the freedom of individual actions but also the creation of conditions which provide the essential ingredients necessary for the fullest development of the personality of the individual. The 'Preamble' lays emphasis on liberty of thought and expression which have been granted in the Constitution through the Fundamental Rights.

In fact, liberty and equality are complementary to each other. Equality does not mean that all human beings are equal mentally and physically. On the other hand, it signifies equality of status, and equality of opportunity. The equality of status is provided by prohibition of artificial restriction on the ground of religion, race, caste, colour, place of residence etc. It is supplemented by the prohibition of untouchability and by the abolition of titles. At the same time, equality of opportunity is provided by the guarantee of rule of law signifying equality before law and non- discrimination in matters of public employment.

The **'Preamble'** emphasises the objective of **Fraternity** in order to ensure the dignity of the individual and the unity of the nation both. Fraternity is understood as a spirit of brotherhood, the promotion of which is absolutely essential in our country which is composed of various races and religions.' Regarding 'dignity of the individual' K.M. Munshi said "It is an instrument not only of ensuring and maintaining democratic set up vehementally but it also recognizes that personality of every individual is sacred." Similarly the words 'Unity and Integrity' "have to prevent tendencies of regionalism, provincialism, linguism, communalism and secessionist and separate activities" more and more so that the dream of the national integration on the lines of enlightened secularism is achieved.

The **Constitution** of a country, in simple terms, is a collection of the legal rules providing the framework for the governance of the country. It reflects the dominant beliefs and interests or some compromise between conflicting beliefs and interests, which are characteristics of the society at the time it was framed and adopted. It is a fact that no Constitution is perfect and the Constitution of India is no exception to this general rule. However, it goes to the credit of India that the wage for constitutional government was so deep-rooted that India devised a Constitution of its own within three years after achieving the political independence. The Constitution India adopted was intended to be not merely a mean of establishing a governmental machinery but also an effective instrument

for orderly social change. The strength and stability of a Constitution depends largely on its ability to sustain a healthy and peaceful social system and when the occasion demands, facilitate the peaceful transformation of its economic and social orders. From this point of view the Constitution has not even a single ideal which even its severest critic would characterise as outmoded or reactionary. Its basic objective is to establish a Democratic, Socialist, Secular Republic with a view to secure Justice, Liberty, Equality and Fraternity to all its citizens.

## INTEXT QUESTIONS 17.4

Fill in the Blanks:

(a) The Preamble contains the ..... of the Constitution.
(characteristics/objectives)

(b) The Preamble of the Constitution described India ..... .
(Unitary State, Sovereign, Socialist, Secular, Democratic State)

(c) The word 'Socialist' and Secular were added in the Preamble by ..... Constitutional Amendment. (42nd/46th)

## 17.5 SALIENT FEATURES OF THE CONSTITUTION

If we look at the various Constitutions of the world, we would come across a variety of features of these Constitutions. Broadly speaking these Constitutions are classified on the basis of the political systems which are adopted by them. Modern political systems are of four categories on four different bases. Firstly there are democratic and authoritarian governments – the classification being based on extent of popular participation and extent of autonomy of the system. Second is based on legislature – executive relationship in a democratic polity. We distinguish them as Parliamentary and Presidential political system. Third, political system is classified between federal and unitary on the basis of geographical distribution of powers. Finally, depending on the economic structure, we classify political systems as capitalist and socialist governments.

In adition to the above, these is another classification popularly known as having written and unwritten Constitution. In most of the political systems the Constitutions are written one. It is only in Britain that the Constitution is categorise as unwritten. There had been a controversy in respect of Constitution of England. Some thinkers are of the opinion that there is no Constitution in England as such whereas some other say that it has the oldest Constitution in the world.

These observations are the result of different interpretations of the single document, written and enacted at a particular time, embodying the fundamental

special sanctity. Such a Constitution may be drawn up either by a convention or Assembly abated for that purpose, or may be promulgated by a monarch or a dictator. Bush Paine and Tocqueville had their eyes fixed on form rather than on substance. Prof Dicey tries to remove the confusion and defines the 'Constitutions' as the British understand it, as the sum total of "rules which directly or indirectly affect the distribution or the exercise of a sovereign power in the State."

To sum up, there is a Constitution in England which was never enacted and is not written. It is the result of gradual evolution of political institution over the centuries and is based on evolution of conventions, which can be modified either by fresh conventions or by laws of the sovereign Parliament 'It is a child of wisdom and chance, whose powers have been some times guided by accident and sometimes by high design.'

## Written Constitution

Unlike the Constitution of England, Constitutions of the United States of America, Canada, France, India are written Constitutions, though these differ from each other in one way or the other. The Constitution of India has the distinction of being the lengthiest and detailed Constitutional document the world has so far produced. It has been the endeavors of the framers of the Constitution to provide for the solutions of all the problems of administration and government of the country. Even those matters which are subjects of convention in others countries have been put down in black and white in the Constitution of India. The Constitution of U.S.A. comprises only seven Articles, the Australian has 128 Articles and the Canadian contains 147 Articles. In order to prepare such a voluminous Constitution, the founding fathers of the Indian Constitution time consumed 2 years, 11 months and 18 days. It is sometimes asked why the framers of Indian Constitution deemed it necessary to draw up such a ponderous constitutional document and ignored what Sir Ivor Jennings has described as the golden rule for all constitution makers, viz., "never to put in anything that can be safely left out." The answer as Sir Ivor Jennings has himself pointed out is, that the great volume of the Indian Constitution is largely a legacy of the past.

For a federation it is essential that its Constitution should be a written one so that both the units, the States and the Centre can refer to it as and when the need be. Accordingly, the Constituent Assembly prepared a written constitution containing 395 Articles and 12 Schedules Hence, it is the most elaborate Constitution of the world and it took almost three years in completing it.

## Partly Rigid and Partly Flexible

Another feature of Indian Constitution which separates it from other constitutions of the world is that it is partly rigid and partly flexible. The procedure laid down by the Constitution for its amendment is neither very easy, as in England nor very rigid as in the United States. In England, which has no written Constitution, there is no difference between an ordinary law and a constitutional law. The constitutional law can be amended exactly in the same manner in which ordinary legislation is passed or amended. In the United States, however, the method of constitutional amendment is highly rigid. It can be carried out only with the agreement of the two third majority of the Congress i.e. the legislative body or the Parliament and its subsequent ratification by at least three fourth of the states. The Constitution of India strikes a golden mean, thereby avoiding the flexibility of the British Constitution and the extreme rigidity of the American Constitution.

In India, only the amendment of a few of the provisions of the Constitution require ratification by the State Legislatures and even that ratification by only ½ of them would suffice (while the American Constitution requires ratification by ¾ of the states). The rest of the Constitution may be amended by a special majority of the Union Parliament i.e. a majority of not less than 2/3 of the members of each House present and voting, which again must be a majority of the total membership of the House.

Besides the above mentioned methods, Parliament has been given the powers to alter or modify the provisions of the Constitution by a simple majority as is required for general legislation, by laying down in the Constitution that such changes shall not be deemed to be 'amendments' of the Constitution. It is important to note that in more than 62 years, a number of constitutional amendments have been passed. This indicates that Indian Constitution is flexible. However, it should be remembered that the basic structure of our Constitution can not be amended.

## Federal System with Unitary Bias

A prominent characteristic of our Constitution is a Federal System with the Unitary base. In others words, though normally the system is federal, the Constitution enables the federation to transform into a Unitary State.

Federalism is a modern concept. Its theory and practice in modern times is not older than American federation which came into existence in 1787. In a federal set up there are two tiers of government with well defined powers and functions. In such a system the Central government and the governments of the units act within a well defined sphere, coordinate with each other and at the same time

act independently. The federal polity, in other words, provides a constitutional device for bringing unity in diversity and for the achievement of common national goals.

## 17.6 FEDERAL FEATURES

The Indian federal system of today has such characteristics which are essential for the federal polity. The main federal features of the Indian Constitution are as follows :

### A. Written and Rigid Constitution

An essential characteristic of a federation is that the Constitution should not only be written but it should be rigid also. This rigidity is specially desired by the federating units so that the Centre subsequently does not change the list of subjects to suit its convenience. In other words, it cannot be changed easily. All the provisions of the Constitution concerning Union-States relations can be amended only by the joint action of the State Legislature and the Union Parliament. Such provisions can be amended only if the amendment is passed by 2/3 majority of the members present and voting in the Parliament (which must also constitute the absolute majority of the total membership) and ratified by at least one half of the States.

### B. Supremacy of the Constitution

In a federation, the Constitution should be supreme both for the Centre as well as the federating units. The Constitution is the supreme law of the land and the laws passed by the Union or the State governments must conform to the Constitution. Accordingly, India's Constitution is also supreme and not the handmade of either the Centre or of the States. If for any reason any organ of the State violates any provision of the Constitution; the courts of law are there to ensure that the dignity of the Constitution is upheld at all costs.

### C. Division of Powers

In a federation there should be clear division of powers so that the units and the Centre are required to enact and legislate within their sphere of activity and none violates its limites and tries to encroach upon the functions of others. This requisite is evident in our Constitution. The Seventh Schedule contains three Legislative Lists, viz Union List, Sate List and Concurrent List.

The Union Lists consists of 97 subjects, the more important of which are defence, foreign affairs, post and telegraph, currency etc. The State List has 66 subjects including – jails, police, administration of justice, public health, agriculture etc.

The Concurrent List embraced 47 subjects including criminal law, marriage, divorce, bankruptcy, trade unions, electricity, economic, social planning and education etc. The Union government enjoys legislative powers to legislate on the subjects mentioned is the Union List. The state governments have full authority to legislate on the subjects of the State List. Both the Centre and the States can legislate on the subjects mentioned in the concurrent list such as education, stamp duty, drugs and poisoneous substances, newspapers etc. However, in case of a conflict between the Union and the State law relating to the same subject, the Union law prevails over the State law. Besides, the power to legislate on all those subjects which are not included in any of the three lists are known as 'Residuary Subjects'. These rest with the Union government.

### D. Independence of Judiciary and Provision of Supreme Court

For a federation, it is essential that the judiciary should be independent there must be provision of Supreme Court to settle federal disputes. It should be custodian of the Constitution. If any law contravenes any provision of the Constitution, the apex court i.e. the Supreme Court of India can declare it as null and void or unconstitutional. In order to ensure the impartiality of the judiciary, the Chief Justice or the judges can not be removed by the executive nor their salaries can be curtailed by the Parliament.

### E. Bicameral Legislature

A bicameral system is considered necessary for a federation. In the Upper House i.e. Council of States, representation is given to the States. In the House of the People or Lok Sabha, the elected members represent the people. The members of Rajya Sabha are elected by the State Legislative Assemblies, but unlike the Senate of the United States (wherein all the 50 States big or small, only two senators are elected), equal representation is not given to 28 States in India.

## INTEXT QUESTIONS 17.5 AND 17.6

1. Mention any four characteristics of the Indian Constitution.
2. How many Articles are there in the Constitution of India?
3. State any two federal features of the Constitution of India.

## 17.7 UNITARY FEATURES

Looking at these features, political thinkers are of the opinion that India has a federal set up. The framers of the Indian Constitution have a different view

point. They opinion that Indian federation is actually not a true federation as there are certain non-federal features, hence India is federal in form but unitary in spirit. Hence, it would be proper to examine the unitary characteristics of the Indian Union :

### A. A Strong Centre

From the division of powers one can make out that the State governments are government of limited and enumerated powers. As against this, the Union government under certain circumstances has power over the State governments and also the control over the residuary subjects.

### B. Single Constitution for the Union and the States

Normally, under a federal set up, the States have their own Constitutions i.e. separate from that of the Union. Such is the case in the United States. On the contrary there is only one Constitution for the Union and the states and there is no separate Constitution for the States in India.

### C. Single Unified and Integrated System of Judiciary

The States of the United States have their own judicial system independent and uncoordinated with the federal judiciary. Australia also has more or less the same pattern. But in India the Supreme Court and the High Courts form a single integrated judicial system. The civil and the criminal law are codified and are applicable to the entire country.

### D. Common All India Services

The Indian Constitution has certain special provisions to ensure the uniformity of the administrative system and to maintain minimum common administrative standards without impairing the federal principle. For this purposes a provision has been made for common all Indian Services.

### E. Appointment of the Governor by the President

The Head of the State, the Governor, is not elected like the Governors of American States. In India, they are appointed by the President, They hold the office during his/her pleasure. The President can transfer him/her from one state to another state, On certain occasions he/she can be asked to look after one or more states. This enables the Union government to exercise control over the State administration.

Notes

## INTEXT QUESTIONS 17.7

1. State any two unitary features of the Indian Constitution.
2. "The Indian Constitution is federal in nature with unitary bias" Is this statement True or False?

## 17.8 CRITICAL ANALYSIS OF INDIAN FEDRALISM

The founding fathers of the Indian Constitution were deeply concerned about ensuring the unity and integrity of the country. They were aware of the forces of disruption and disunity working within the country. These changes, at the time of independence, could be handled only by a strong government at the Centre. Hence, the framers of the Constitution assigned a predominate role to the Centre. At the same time they made provisions for the establishment of a co- operative federalism. It is also a fact that during the working of the last six decades, the relations between the Centre and the States have not always been cordial.

It may be noted that unity and diversity are very well co-ordinated in federal system. The units of a federation enjoy political and economic autonomy in their internal administration. It is a fact that federation is based on the principle decentralisation. It implements the idea that the government should be nearer the people so that they can reach it. Local problems can be more easily solved by the local and regional government, rather than one over – burdened central government. Division of powers leads to greater efficiency. Stability is better maintained in the federal system.

On the other hand, federal government has certain shortcomings also. Different political parties in power at the Centre and in some of the States, the possibility of political clashes is increased. No doubt, federalism is certainly an expensive system. Herman Finer correctly opined, "It is financially expensive since there is a lot of duplication of administrative machinery and procedure. It is wasteful of time and energy, and that it depends much on negotiations, political and administrative, to secure uniformity of law and proper administrative fulfillment." In India, after every crisis, the centre has emerged more powerful than before, which shows that crisis can be better solved by a powerful central government. This proves the weakness of federalism and strength of the unitary government. However, despite certain shortcomings, the federal government appears a better and fair alternative.

While summing up, one seems to be agreeing with Durga Das Basu that India is neither purely federal nor purely unitary but is a combination of both. It is a Union or Composite State of a novel type. Political thinkers have stated that

the Central government has, in fact, such extraordinary authority that India is not more than a 'quasi – federal' at best, or that if it is a federation at all, it has many unitary features. In the words of G. N. Joshi, "These, then, are some of the special features of the Indian Union. It both resembles and differs from other federations. It may correctly be described as a 'Quasi – Federation' with many elements of unitarity."

## INTEXT QUESTIONS 17.8

1. "India is neither purely federal nor purely unitary, but is a combination of both" (True/False)
2. "India can be correctly be described as Quasi– Federation with many elements of unitarity." (True/False)

## WHAT YOU HAVE LEARNT

A Constitution symbolises independence and sovereignty of a country. The framing of the Constitution of India was completed on November 26, 1949 when the Constituent Assembly formally adopted the new Constitution. The Constitution came into force with effect from January 26, 1950.

The Constitution regains with Preamble which declare India Sovereign, Socialist, Secular, Democratic, Republic. The Preamble also maintains the goals of securing justice, liberty and equality for all its citizens and promotion of Nation's unity and integrity on the basis of fraternity among the people assuming the dignity of the individual.

The Constitution of India has several distinctive features. It is the lengthiest written Constitution in the world and it is a combination of rigidity and flexibility. The Constitution provides for a quasi-federal set up with a strong center. There is a class division of powers between the Center and the States. There is an independent single unified system of judiciary. The Supreme Court of India is the apex court of India. There are certain unitary features in the Indian Constitution such as Single Constitution, Single Citizenship, All India Services and the distribution of power in favour of the Center. India has a Parliamentary form of government headed by the Prime Minister who is responsible to the Parliament both individually and collectively.

## TERMINAL QUESTIONS

1. What is the importance of the Preamble to the Constitution?
2. What are the essential characteristics of a Federal State?

3. Explain the meaning and relevance of secularism in Indian Context.
4. Explain the significance of 'Supermacy of the Constitution'.
5. Explain briefly 'India as a Federal State'.
6. Write short notes on:
   (a) Supermacy and Independence of Judiciary
   (b) India as a Welfare State.
   (c) Role of the Constituent Assembly.

## ANSWER TO INTEXT QUESTIONS

### 17.1

1. A Welface State can be described a State which does maximum good of the maximum people.
2. (i) Democratic Republic State
   (ii) Secular State

### 17.2

1. Dr. B. R. Ambedkar
2. Dr. Rajendra Prasad

### 17.3

1. True
2. True

### 17.4

(a) Objectives

(b) Sovereign, Socialist, Secular, Democratic, Republic.

(c) 42$^{nd}$ Constitutional Ammendment

### 17.5 and 17.6

1. (a) Written Constitution
   (b) Partly rigid and partly flexible
   (c) Supremacy of the Constitution
   (d) Supremacy and indepence of judiciary
2. 395

3. (i) Division of Powers.
   (ii) Written Constitution.

## 17.7

1. (i) Single unified and integrated system of judiciary.
   (ii) Single Constitution for the Union and the States.
2. True

## 17.8

1. True
2. True

Notes

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18

# CONSTITUTIONALISM AND PREAMBLE

The Constitution of a country provides the basis for the governance of the country. The Constitution contains the law and principles according to which a State is governed. A Government which is controlled or limited by a Constitution, is called a Constitutional Government. 'Constitutionalism' means belief in a constitutional Government or belief in constitutional principles.

The Constitution of India begins with a Preamble. The Preamble contains the ideals objectives and basic principles of the Constitution. The Preamble to the Constitution has played a predominant role in shaping the destiny of the country. The Preamble is of great utility as a guide to the interpretation of the constitutional provisions of the Constitution.

## OBJECTIVES

After studying this lesson, you will be able to :

- understand the meaning of the term 'Constitutionalism';
- recognise the significance of the Constitution as the fundamental law of the land;
- describe the 'Preamble' to the Constitution, its ingradiants and its relevance;
- identify the basic principles of 'Preamble' and their reflection in the constitutional provisions;
- know if the 'Preamble' forms part of the Constitution or not;
- understand and analyse the role of 'Preamble'; and
- identify the interpretational value of the Preamble.

## 18.1 CONSTITUTIONALISM

The document containing laws and rules which determine and describe the form of the government, the relationship between the citizens and the government, is called a 'Constitution'.

As such, a Constitution is concerned with two main aspects i.e. the relation between different organs and different levels of government and between the government and the citizens. The Constitution of a country provides the basis for governance of the country. A Constitution contains basic or fundamental laws of the land and established rule of law.

In short, Constitution contains law and principles according to which a State is governed.

A government which is controlled or ruled or limited by a Constitution, is called a constitutional government.

'Constitutionalism' means belief in a constitutional government or belief in constitutional principles. Constitutionalism establishes a constitutional government which is controlled or ruled by a Writen Constistitution.The development of Judicial system can be traced to the growth of 'Constitutionalism'.

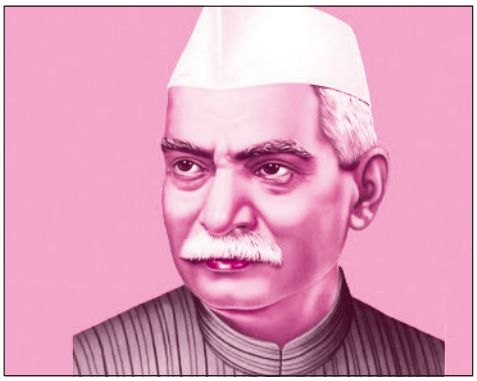

**Figure 18.1** Dr. Rajendra Prasad President of Constituent Assembly

**Figure 18.2** Dr. B.R. Ambedkar Chairman of Drafting Committee of Constitution

### INTEXT QUESTIONS 18.1

1. Describe briefly the meaning of 'Constitution'.
2. What do you mean by the term 'Constitutionalism'?

## 18.2 PREAMBLE OF THE CONSTITUTION

The Constitution of India begins with a 'Preamble'. The 'Preamble' contains the ideals, objectives and the basic principles of the Constitution.

The Preamble reads :

**Preamble**

**We, the people of India, having solemnly resolved to constitute India into SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens.**

**JUSTICE, Social, economic and political;**

**LIBERTY of thought, expression, belief, faith and worship;**

**EQUALITY of status and of opportunity;**

**and to promote among them all.**

**FRATERNITY assuring the dignity of the individual and the unity and integrity of the nation.**

**IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.**

The Preamble, in brief, explains the objectives of the Constitution in two ways; one, about the structure of governance and the other, about the ideals to be achieved by India. It is because of this, that the Preamble is considered to be the key of the Constitution.

The 'objectives' specified in the 'Preamble' contains the basic structure of the Constitution which cannot be amended in exercise of the power under Article-368 of the Constitution.

The following judgements of the Supreme Court relates to the theory of basic structure of the Constitution.

**(1) Keshavananda Bharti V. State of Kerala, AIR 1973 SC 1461.**

**(2) Indira Gandhi V. Raj Narayan, AIR 1975 SC 2299**

**(3) Minerva Mills Ltd. V Union of India, AIR 1980 SC 1789**

**(4) Ref. Berubari union (1), (1960) 3 SCR-250.**

The 'Preamble' has been amended by the Constitutions, 42nd Amendment Act of 1976. It is important to note that in 'Keshvanand Bharti', case the Supreme Court held that the Preamble is the basic structure of the Constitution whereas

the same Court held in the famous 'Berubari case' that the Preamble is not the basic structure of the Constitution.

### Ingredients of the Preamble

The preamble reveals four ingrediants of components:

1. Source of authority of the Consitution: The Preamble States that the Constitution derives its authority from the people of India.
2. Nature of the State: It declares India to be of a Sovereign, Socialist, Secular democratic and Republic Polity.
3. Objectives of the Constitution: It specifies Justice, liberty, Equality and Praternity as the objectives.
4. Date of adoption of the Constitution: It stipulates November 26, 1949 as the date of adoption.

## INTEXT QUESTIONS 18.2

**Fill in the blanks:**

1. The Preamble contains the ..... of the Constitution.
2. The Preamble explains the ..... of the Constitution.
3. Name any one ingredient or component of 'Preamble'.

## 18.3 PREAMBLE: IS IT A PART OF THE CONSTITUTION?

It is interesting to note that the Preamble, though the Constitution opens with it, was not the first to come into existence. It was the last piece of drafting adopted by the Constituent Assembly at the end of the first reading of the Constitution and then mentioned in the beginning of the Constitution. The motion to adopt the Preamble was moved on 17$^{th}$ October, 1949. The President of the Drafting Committee moved the motion — "That the Preamble stands part of the Constitution." The motion was adopted on November 2, 1949. The Preamble was added to the Constitution.

The vexed question whether the Preamble is a part of the Constitution or not was dealt with in two leading cases on the subject:

### 1. Berubari Case

### 2. Kesavananda Bharati Case

On the answer to the primary question — whether the Preamble is a part of the Constitution, would depend on the resolution of the next question, which follows as a corollary – whether the Preamble can be amended, if at all.

### 18.3.1 Preamble is not a part of the Constitution

*Berubari Case* was the main Reference "under Article 143(1) of the Constitution of India on the implementation of the Indo-Pakistan Agreement relating to Berubari Union and Exchange of Enclaves" which came up for consideration by a Bench consisting of eight Judges headed by the *Chief Justic B.P. Sinha*. Justice *Gajendragadkar delivered the unanimous opinion* of the Court. The Court ruled that the Preamble to the Constitution, containing the declaration made by the people of India in exercise of their sovereign will, no doubt is "a key to open the mind of the makers" which may show the general purpose for which they made the several provisions in the Constitution but nevertheless the Preamble is not a part of the Constitution.

The holding in *'Berubari case'* has been summed up later by Justice Shelat and Justice Grover. in *Kesavanand case* (vide para 534) as under:

1. A Preamble to the Constitution serves as a key to open the minds of the makers, and show the general purpose for which they made several provisions in the Constitution;
2. The Preamble is not a part of our Constitution;
3. It is not a source of the several powers conferred on government under the provisions of the Constitution;
4. Such powers embrace those expressly granted in the body of the Constitution 'and such as may be implied from those granted';
5. What is true about the powers is equally true about the prohibitions and limitations;
6. The preamble did not indicate the assumption that the first part of Preamble postulates a very serious limitation on one of the very important attributes of sovereignty viz. ceding territory as a result of the exercise of the sovereign power of the State of treaty-making and on the result of ceding a part of the territory.

*Berubari case* was relied on in *Golak Nath case* Justice Wanchoo, said:

> "On a parity of reasoning we are of the opinion that the Preamble cannot prohibit or control in any way or impose any implied prohibitions or limitations on the bar to amend the Constitution contained in Article 368".

Justice Bachawat, observed:

> "Moreover the Preamble cannot control the unambiguous language of the Articles of the Constitution."

### 18.3.2 Preamble as a part of the Constitution

It is a matter of regret, yet a matter of record, that constitutional history was overlooked by the eminent Judges constituting the Bench answering the Presidential Reference in *'Berubari case'*. The motion adopted by the Constituent Assembly stated in so many words that the Preamble stands as a part of the Constitution. The error came to be corrected in *'Kesavananda case'* where the majority specifically ruled that the Preamble was as much a part of the Constitution as any other provision therein. *Kesavananda Bharti case* has thus created history.

It would be interesting to note what some out of the thirteen Judges constituting the Bench which decided *'Kesavananda Bharati' case* had to say about the Preamble, For the first time, a Bench of thirteen Judges assembled and sat in its original jurisdiction hearing the writ petition. Thirteen Judges placed on record 11 separate opinions. It is not an easy task to find out the ratio of the holding of the Court in *Kesavananda Bharati case.* To the extent necessary for the purpose of the Preamble, it can be safely concluded that the majority in *Kesavananda Bharati case* leans in favour of holding, (*i*) that the Preamble to the Constitution of India is a part of the Constitution; (*ii*) that the Preamble is not a source of power nor a source of limitations or prohibitions; and (*iii*) the Preamble has a significant role to play in the interpreatation of statutes also in the interpretation of provisions of the Constitution. When it is necessary to determine the width or reach of any provision or when there is any ambiguity or obscurity in the provision which needs to be clarified or when the language admits of meanings more than one the Preamble may be relied on. However, the Preamble cannot be utilised as an aid to interpretation when the language is plain and unambiguous.

An interesting argument advanced in *Kesavananda case* has been noted by Justice Y.V. Chandrachud, that the Preamble may be a *part* of the Constitution but is not a *provision* of the Constitution and therefore, you cannot amend the Constitution so as to destroy the Preamble. Discarding the submissions Chandrachud, J. held that it was impossible to accept the contention that the Preamble is not a provision of the Constitution; it is a part of the Constitution and is not outside the reach of the amending power under Article 368. The record of the Constituent Assembly leaves no scope for this contention. It is transparent from the proceedings that the Preamble was put to vote and was actually voted upon to form a part of the Constitution. The Preamble records, like a sunbeam, certain glowing thoughts and concepts of history and the argument is that in its very nature it is unamendable because no present or future, however mighty, can assume the power to amend the true facts of past history. Though the true facts of past history cannot be changed yet the Preamble in other parts can be amended.

*Keesavananda Bharati case* is a milestone and also a turning point in the constitutional history of India. The divergence in judicial opinion on issues of grave constitutional significance which arose for decision in the case is amazing and interesting to any student of constitutional law. Each of the learned Judges recording his opinion has chosen the choicest words and has been at his best while translating into words the dreams of our Founding Fathers and of "We, the people of India."

Justice D.G. Palekar, held that the Preamble is a part of the Constitution and, therefore, is amendable under Article 368. He termed the submission that the Fundamental Rights are an elaboration of the Preamble, as "an overstatement and a half-truth".

In the opinion of Justice H.R. Khanna, the Preamble is a part of the Constitution. He developed a concept of natural rights linked with cherished values like liberty, equality and democracy as enthroned in the Preamble. He agreed that such rights are inalienable and cannot be affected by an amendment of the Constitution for these are cherished values and representative of those ideals for which men have striven through the ages.

Justice Khanna, also rejected the submission that the Preamble is not a part of the Constitution but "walks before the Constitution". In his opinion, the Preamble was as much a part of the Constitution as its other provisions and hence amenable to constitutional amendment excepting those provisions which relate to the basic structure or framework of the Constitution, and therefore to the extent to which the Preamble itself is amendable, its provisions other than those relating to basic structure cannot be read as imposing any implied limitations on the power of amendment.

Justice S.N. Dwivedi, expressing his concurrence with the conclusion arrived at by Justice A.N. Ray, held that the Preamble was a part of the Constitution. It is noteworthy that Justice Dwivedi held the Preamble to be a part of the Constitution and then also referred to it as a provision of the Constitution.

In conclusion, Justice Beg, held that there was no limitation on the powers of constitutional amendment found in Article 368.

## INTEXT QUESTIONS 18.3

**Fill in the Blanks:**

1. In ..... case the Supreme Court held the Preamble to the Constitution is the basic structure of the Constitution.

2. In ..... case the Supreme Court held that the Preamble to the Constitution is not the basic structure of the Constitution.
3. "The Preamble to the Constitution is a part of the Constitution". Do you agree with this statement? If yes, cite the relevant case in support of your answer.

## 18.4 ROLE OF THE PREAMBLE

The Preamble of the Constitution can be discussed as under :

1. Role of the Preamble; and
2. Interpretational value of the Preamble

The interpretational value of the Preamble can further be studied in three dimensions:

**(a) Preamble as Interpreter of the Constitution;**

**(b) Preamble as a source of interpretation of other Statutes framed under the Constitution; and**

**(c) International Documents/Treaties/Conventions/Declarations as aid to Interpretation of the Preamble.**

The Preamble to the Constitution has played a predominant role in shaping, the destiny of the country. Wherever the limbs of democracy have moved on the path laid down by the Preamble the movement has been in the right direction. Any deviation from the path has resulted in aberrations.

"The arch of the Constitution of the India pregnant from its Preamble, Chapter III (Fundamental Rights) and Chapter IV (Directive Principles) is to establish an egalitarian social order guaranteeing fundamental freedoms and to secure justice — social, economic and political — to every citizen through rule of law. Existing social inequalities need to be removed and equality in fact is accorded to all people irrespective of caste, creed, sex, religion or region subject to protective discrimination only through rule of law."

The propositions laid down in *Berubari Union and Exchange of Enclaves, Re case were:*

1. A Preamble to the Constitution serves as key to open the minds of the makers, and shows the general purpose for which they made the several provisions in the Constitution.
2. The Preamble is not a part of our Constitution.
3. It is not a source of the several powers conferred on the Government under the provisions of the Constitutions.

4. Such powers embrace those expressly granted in the body of the Constitution "and such as may be implied from those granted".
5. What is true about the powers is equally true about the prohibition and limitations.
6. The Preamble did not indicate the assumption that the first part of the Preamble postulates a very serious limitation on one of the very important attributes of sovereignty viz. ceding territory as a result of the exercise of the sovereign power of the State of treaty-making and on the result of ceding a part of the territory.

However, according to Justice Shelat and Justice Grover, in *Kesavananda Bharti case* the history of the drafting and the ultimate adoption of the Preamble shows—

1. That it did not "walk before the Constitution" as is said about the Preamble to the United States Constitution;
2. That it was adopted as a part of the Constitution;
3. That the principles embodied in it were taken mainly from the Objectives Resolution;
4. The Drafting Committee felt, it should incorporate in it "the essential features of the new State"; and
5. That it embodied the fundamental concept of Sovereignty being in the people.

Interesting question arise: Can the Preamble itself be amended? Does the Preamble control Article 368 — the power to amend the Constitution?

The significance of the Preamble is that it contains the fundamentals of our Constitution. Could the power to amend under Article 368 be made to suffer a complete loss of identity or can the basic element on which the constitutional structure has been erected be eroded or taken away? The people of India resolved to constitute their country into a Sovereign Democratic Republic. No one can suggest that these words and expression are ambiguous in any manner. Their true import and connotation is too well known that no question of any ambiguity is involved. The question which immediately arises is whether the words "amendment" or "amended" as employed in Article 368 can be so interpreted as to confer a power on the amending body to take away any of these three fundamental and basic characteristics of our policy. Can it be said or even suggest that the amending body can make institutions created by our Constitution undemocratic as opposed to Democracy; or abolish the office of the State who would not fit into the conception a "Republic"? The width of the power claimed on behalf of the respondents has such a large dimension that

even the above part of the Preamble can be wiped out from which it would follow that India can cease to be a Sovereign Democratic Republic and can have a polity denuded of sovereignty, democracy and republican character.

The Learned Judges termed the submission made before them that even the Preamble can be varied, altered or repeated, as an "extraordinary one" and held that the Preamble constitutes a landmark in India's history and sets out as a matter of historical fact what the people of India resolved to do for molding their future destiny. It is unthinkable that the Constitution-marks ever conceived of a stage when it would be claimed that even the Preamble could be abrogated or wiped out.

Justice A.N. Ray, in his opinion posed a question which can befittingly be read as referring to the Preamble. The question is — "He that planted the ear, shall he not hear? Or, He that made the eye, shall he not see?" He agreed that the Preamble is an integral part of the constitution noting the motion passed by the Constituent Assembly—

> "The Preamble stands part of the Constitution, and held that the Preamble can be repealed. As to the significance and utility of the Preamble he held that the Preamble is property resorted to where doubts or ambiguities arise upon the words of the enacting part. If the enacting words are clear and unambiguous, there is little room for interpretation, except the cases leading to an obvious expressed in the Preamble. This is the view of Story. The Preamble can never be resorted to enlarge the powers confided to the general government. The Preamble can expound the nature, extent and application of the powers actually conferred by the Constitution and not substantively create them."

The Preamble to a Constitution refers to the frame of the Constitution at the time of the Preamble, and therefore, it can possibly have no relevance to the constituent power in the future when that Constitution itself can be changed. The position would be the same so far the Preamble is concerned — whether the constituent power is exercised by the amending body provided for by the people themselves in the Constitution or by referendum if so provided for in the Constitution.

There is nothing in the Preamble to suggest that the power to amend the fundamental right to property is cut down. The Preamble makes no reference to the right to property. On the contrary, it is clearly implied that if the operative parts of the Constitution failed to put us on the road to the objectives, the Constitution was liable to be appropriately amended. Right to property that would have conflicted with the objectives of securing to all its citizens, justice, social, economic and political, and equality of opportunity, to achieve which

Directive Principles were laid down. The Preamble can neither increase nor decrease the power granted in plain and clear words in the enacting parts.

Jurists and judicial opinion hold unanimously (except for variation in choosing the words of expression) that the Preamble to the Constitution of India is not just a formal piece of draft. It is in itself a historic document and yet a part of the Constitution. It is a source of interpretation and the basis of rule of law. It has guided the destiny of this nation at least through the judiciary, a pillar of constitutional democracy, the sturdy and powerfulmost. It will continue to play its role, as thought of by the framers of the Constitution, in the times to come.

Durga Dass Basu, the eminent constitutional jurist states that the majority of the nine Judges in *Bommai case* have laid down a new application of the Preamble under the Constitution as follows:

I. The Preamble indicates the basic structure of the Constitution.

II. A Proclamation under Article 356(1) is open to judicial review on the ground of violating the basic structure of the Constitution.

III. It follows that a Proclamation under Article 356(1) which violates any of the basic features as summarised in the Preamble of the Constitution is summarised in the Preamble of the Constitution is liable to be struck down as unconstitutional.

A discussion on the role of the Preamble cannot be complete without making a reference to *Indra Sawbney V. Union of India* popularly known as *Mandal Commission case* decided by a larger Bench of nine Judges. A rainbow of judicial thoughts reflecting the significance value and message of the Preamble can just be seen. Justice S. Ratnavel Pandian, opined—

> "Equality of status and of opportunity … the rubric chiseled in the luminous Preamble of our vibrating and pulsating Constitution radiates one of the avowed objectives in our sovereign, socialist and secular democratic republic."

Several constitutional provisions dealing with equal distribution of justice in the social, political and economic spheres, spoken of in the 'Preamble' need prismatic interpretation to perceive not through an artless window glass but reflected with the enhanced intensity and beauty of the notable aspirations contained in Fundamental Rights illuminating the constitution has to be upheld for securing social justice, economic justice and political justice must be so in it's the adoption to the changing social needs. No one can be permitted to invoke the Constitution either as a sword for an offence or as shield for anticipatory

defence. No interpretation of the Constitution is acceptable which causes irrevertible injustice and irredeemable inequalities to any section of the people or can protect those unethically claiming unquestionable dynastic monopoly over the constitutional benefits. Fostering an advanced social policy in term of the constitutional mandates cannot be performed by sitting in ivory towers, keeping an Olympian silence, unnoticed and uncaring of the storms and stresses that affect the society.

Human sentiments overtook the judicial opinion recorded by Justice Dr T.K. Thommen. He said that with the city slum-dwellers, the inhabitants of the pavements afflicted and disfigured in many cases by diseases like leprosy, caught in the vicious grip of grinding penury, and making a meagre living by begging besides the towering mansions of affluence visible to the eyes, the real India transcends all barriers of religion, caste, race etc. in their degradation, suffering and humiliation. These living monuments of backwardness, a shameful reminder of our national indifference are a cruel betrayal of what the Preamble to the Constitution proclaims.

Justice Kuldip Singh, hit at the caste system which in spite of having been put in the grave by the framers of the Constitution continues to try raising its ugly heads in various forms posing a serious threat to the secularism and consequently to the integrity of the country. He warns those who did not learn from the events of history that they are doomed to duffer again. For the people of India, it is of the utmost importance to adhere in letter and spirit to the Constitution which has moulded this country into a sovereign, socialist, secular, democratic republic and has promised in its Preamble to secure to all its citizens justice, social, economic and political, equality of status and of opportunity.

Justice P.B. Sawant recorded his conviction that so long as equality of opportunity is not ensured to all, the goal enumerated in the Preamble to the Constitution, of fraternity assuring the dignity of an individual and the unity and integrity of the nation shall remain unattainable.

Inequality ill-favours fraternity, and unity remains a dream without fraternity. So long as economic justice is not guaranteed to all, social and political justice pledged by the Preamble to be secured to all citizens will remain a myth. Securing employment — whether private or public — is a means of direct and hence a means of social leveling. Such employment ought to be secured to them who were denied the same in the past so as to do social and economic justice to the deprived as ordained by the Preamble.

In the opinion of Justice R.M. Sahai, the Preamble to the Constitution is a turning point in history. Our Constitution was "a break with the past" and was farmed with "a need for fresh look". The Preamble of the Constitution, echoing the sentiments of a nation, harassed for centuries by foreign domination. He observed:

> "to secure, to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and opportunity; and to promote among them all fraternity assuring the dignity of the individual was not a mere flourish of words but was an ideal set-up for practice and observance as a matter of law through a constitutional mechanism. Communal reservations were outlawed both from governance and administration".

Justice P.B. Sawant qualified the Preamble with the expression—

> "the basic feature of the Constitution, which promises equal opportunity and status and dignity to every citizen. Looked at from this angle, compensatory or remedial measures for the lesser fortunate are not, Ipso facto, violative of equal opportunity as our society was founded not on abstract theory that all men are equal but on the realism of societal differences created by human methodology, the poor and rich"

Justice B.P. Jeevan Reddy, spoke for M.H. Kania, C.J. and M.N. Venkatachaliah, A.M. Ahmadi, JJ. and himself. According to him, the four-fold objective of securing to its citizens justice, liberty, equality and fraternity displays statesmanship has of the highest order — the likes of which our country has not seen since — belonging to the field of law, politics and public life coming together to fashion the instrument of change — the Constitution of India. The framers of the Constitution did not rest content with evolving the framework of the State; they also pointed out the goal as spelled out in the Preamble and the methodology for reaching that goal elaborated in Parts III and IV. Justice Jeevan Ready, traced the origin of certain expressions employed in the Preamble. "Liberty, equality and fraternity" was the battle-cry of the French Revolution. It is also the motto of our Constitution, with the concept of "justice — social, economic and political" — the sum total of modern political thought — superadded to it. Equality has been and is the single greatest craving of all human beings at all points of the time. It has inspired many a great thinker and philosopher. All religious and political schools of thought, if one looks to it ignoring the later crudities and distortions. Liberty of thought, expression, belief, faith and worship has equally been an abiding faith with all human beings, and at all times in this country in particular. Fraternity assuring the indian context. Right to equality, a dynamic, multifacet and evolving concept, aims at equality of status and of opportunity. "Justice — social, economic and political" is the sum total of the aspirations incorporated in Part IV.

During discussions on amendments in the Preamble, on October 17, 1949 Acharya J.B. Kripalani made a passionate speech full of sentiments. He stated inter alia that the President of the Assembly has, like a good host reserved the choicest wine for the last. The Preamble which should have come in the

beginning of the Constitution was being taken up at last though to be placed in the beginning of the Constitution. At the solemn hour he reminded the House that:

> "What we have stated in this Preamble are not legal and political principles only. They are also great moral and spiritual principles. In fact these were not first legal and constitutional principles, instead they were really spiritual and moral principles."

He said further, that:

> "Democracy is equality of man and implies fratenity and non-violence above all. Violence is anathema to Democracy".

He further added:

> "If we want to use democracy as only a legal, constitutional and formal advice, we shall fail. The whole country should understand the moral, the spiritual and the mystic implicatins of the word 'democracy'."

It seems as if Acharya Kripalani was speaking only yesterday. The Preamble to the Constitution is not just a piece of legal drafting or a matter of mere formality. It is a code of conduct. It is a lesson in morality and ethics — to be learnt by heart and to be practised. It contains philosophy, full of spiritualism and mysticism. It has a rhythm and message of ringing bells. Do we have ears to listen, eyes to read and hearts to understand?

## INTEXT QUESTIONS 18.4

1. Discuss briefly, the role of the Preamble in the working of the Constitution.
2. "The Preamble to the Constitution plays a predominant role in shaping the Destiny of the Country" Is this statement True or False?

## 18.5 INTERPRETATIONAL VALUE OF THE PREAMBLE

The interpretational value of the Preamble can be studied in three dimensions:

(a) Preamble as the Interpreter of the Constitution itself;

(b) Preamble as a source of Interpretation of other statutes framed under the Constitution; and

(c) International Documents/Conventions/ Declarations as Aid to Interpretation of the Preamble

## (a) Preamble as Interpreter of the Constitution

With the pronouncement of the Supreme Court in *Kesavananda Bharti, Chandra Bhavan and Dharwad District PWD Literate Daily Wage Employees Association,* it is trite that the Preamble may be invoked to determine the ambit, sweep and scope of Fundamental Rights and Directive Principles of State Policy.

The Preamble of the Constitution furnishes the key to open the mind of the makers of the Constitution more so because the Constitution Assembly took great pains in its formation so that it may reflect the essential features and basic objectives of the Constitution. The Preamble is a part of the Constitution but the Preamble can neither be regarded as the source of any substantive power nor as a source of any prohibition or limitation. The Preamble of a Constitution can be used to understand the object of any amendment. The majority Judges in *'Kesavananda* and *Minera Mills'* strongly relied on the Preamble in reaching the conclusion that power of amendment conferred by Article 368 was limited and did not enable Parliament to alter the basic structure or frameworks of the Constitution.

In *'AIIMS Students' Union V. AIIMS'* while striking down a reservation within reservation, not supported by the Constitution or constitutional principles, the Court pressed into service the Preamble to the Constitution. The Court observed that the Preamble to the Constitution of India secures as one of its objects "fraternity" assuring the dignity of the individual and the unity and integrity of the nation to "we the people of India". Reservation unless protected by the Constitution itself, as given to us by the founding fathers and as adopted by the people of India, is subversion of fraternity, unity and integrity and dignity of the individual.

It is the Preamble which spells out the Constitution being the source of all powers derived from the people of India in whom vests the ultimate power and strength. Chief Justice R.S. Pathak, speaking for the Constitution Bench, held in *'Kehar Singh* v. *Union of India'* that the Constitution of India is a document, in keeping with modern constitutional practice, and fundamental to the governance of the country. The people of India have provided a constitutional policy consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the Constitution. All powers belong to the people, and it is entrusted by the intention of working out, maintaining and operating a constitutional order. This is spelled out from the significant recitals contained in the preambular statement of the Constitution.

Chief Justice S.M. Sikri, during the course of his judgment in *'Kesavananda Bharati case',* by way of interlude to interpretation of the Constitution, observed that the Constitution had our history in the background and had to be interpreted in the light of our aspirations and hopes and other relevant circumstance. No

other Constitution combines under its wings such diverse peoples, numbering now more than 550 million, with different languages and religions and in different stages of economic development, into one nation, and no other nation is faced with such vast socio-economic problems. The Constitution cannot be interpreted like an ordinary Statue but as a Constitution which apart from setting up a machinery for the Government has a noble and grand vision. The vision was put in words in the Preamble and carried out in part by conferring fundamental rights on the people. The vision was directed to be further carried out by the application of Directive Principles (paras 14-15). Dissenting with Re *Berubari Union* and the opinion of Justice Wanchoo, and Justice Bachawat, in *Golak Nath case* that the Preamble is not a part of the Constitution, C.J. Sikri opined in *Kesavananda's Bharati case* that the Preamble was expressly voted to be a part of the Constitution. The holding that the Preamble is not a source of power cannot be extended as regards prohibitions and limitations. There was ample authority available to show that limitations have been derived in certain cases from the Preamble. The Preamble to the Constitution does not prescribe any vague doctrine. He concluded that the expression "amendment of this Constitution" in Article 368 means in addition or change in any of the provisions of the Constitution within the broad *contours* of the Preamble and the Constitution to carry out the objects in the Preamble and the Directive Principles. Applied to Fundamental Rights it would mean that while Fundamental Rights cannot be abrogated, reasonable abridgement of Fundamental Rights can be effected in the public interst. The concept of amendment within the contours of the Preamble and the Constitution cannot be said to be a vague and unsatisfactory idea which parliamentarians and the public would not be able to understand.

Justice J.M. Shelat and Justice A.N. Grover, jointly recorded their opinion in *Kesvananda Bharati case*. According to them, the Preamble to the Constitution of India embodies the great purposes, objectives and the policy underlying its provisions apart from the basic character of the State which was to come into existence i.e. a Sovereign Democratic Republic. Parts III and IV which embody the Fundamental Rights and Directive Principles of State Policy are the conscience of the Constitution. In addition to the historical background and the scheme of the Constitution, the use of the Preamble has always been made and is permissible if the word "amendment" has more than one meaning. The Constitution-makers gave to the Preamble the pride of place. It contains all the ideals and aspirations for which the country had struggled during the British regime and a Constitution was sought to be enacted in accordance with the genius of the Indian people. It certainly represented an amalgam of schemes and ideas adopted from the Constitution of other countries. But the constant strain which runs throughout each and every article of the Constitution is reflected in the Preamble which could and can be made sacrosanct. It is not without

significance that the Preamble was passed only after draft articles of the Constitution had been adopted with such modifications as were approved by the Constituent Assembly. The Preamble was, therefore, meant to embody in a very few and well-defined words the key to the understanding of the Constitution.

The learned Judges noticed the explanation offered by the President of the Constitution Assembly for putting the Preamble last. It was done to see that the Preamble was in conformity with the Constitution as accepted. Various amendments suggested in the draft text of the Constitution were rejected. One of the amendments suggested was to insert into it the words, "In the name of God." That was rejected on the ground that it was inconsistent with the freedom of faith which was not only promised in the Preamble itself but was also guaranteed as a fundamental right. An amendment which would have made it clear beyond all doubt that sovereignty vested in the people was not accepted on the short ground that the Preamble as drafted could convey no other meaning than that the Constitution emanated from the people and sovereignty to make this Constitution vested in them.

Justice Khanna, set out two utilities of the Preamble from the point of view of interpretation of the Constitution or Statutes: (*1*) reference can be made to the Preamble for the purpose of construing when the words of a Statute or the Constitution are ambiguous and are admitted; (*2*) the Preamble can also be used to shed light on and clarify obscurity in the language of a statutory or constitutional provision. When, however, the language of a Section or Article is plain and suffers from no ambiguity or obscurity, no gloss can be put on the words of the section or Article by invoking the Preamble.

Justice Jaganmohan Ready, speaking of the source and force behind the Constitution observed that the fact that the Preamble professed in unambiguous term that it is the people of India who have adopted, enacted and "given to themselves this Constitution", that the Constitution is being acted upon unquestioned for the last over twenty-three years and every power and authority is purported to be exercised under the Constitution; and that the vast majority of the people have, acting under the Constitution, elected their representatives to Parliament and the State Legislatures in general elections, makes the proposition indisputable that the source and the binding force of the Constitution is the sovereign will of the people of India. In his opinion the Preamble to the Constitution finally settled by the Founding Fathers after the Constitution was framed so as to conform to the ideals and aspirations of the people embodied in that instrument. The Preamble declares in a ringing tone the purpose and objectives which the Constitution was intended to subserve.

In the opinion of Justice Jagnamohan Ready, the utility of the Preamble in interpreting the Constitution though a subject of depth yet it is clear from the opinion of jurists that (*a*) the Preamble is a key to open the mind of the makers as to the mischiefs, which are to be remedied; (*b*) that it is properly resorted to, where doubts or ambiguities arise upon the words of the enacting part; (*c*) even where the words are clear and unambiguous, it can be used to prevent an obvious absurdity. (*d*) there is every season to believe that the intentions of the framers as stated in the preamble, found expression in fundmental law or the constitution. (*e*) the Preamble can never be resorted to, to enlarge the powers expressly given, nor to substantively create any power or to imply a power which is otherwise withdrawn from the Constitution; its true function is to expound the nature, extent and application of the powers actually conferred by the Constitution.

The American concept is that the Preamble may not be resorted to as a source of federal authority but the value and use of the Preamble is to ascertain the essential concepts underlying the Constitution.

English cases show that the Preamble can be resorted to as a means to discover the legislative intent of which one may be cited. The gist of the English view is that: (*a*) the Preamble cannot enable going further than what the enacting words indicate; (*b*) the Preamble cannot be pressed into service for finding out the meaning of the enacting words when the meaning of the Preamble itself is in doubt. Having referred to other authorities Justice Jaganmohan Ready concluded by holding that statute where the words are ambiguous or even where the words are unambiguous to aid a construction which will not lead to an absurdity. Where the Preamble conveys a clear and definite meaning, it would prevail over the enacting words which are relatively obscure or indefinite or if the words are capable of more than one constitution, the construction which fits the Preamble may be preferred.

Discussing the utility of the Preamble as a guide to the interpretation of the constitutional provisions, Justice Chandrachud, discarded the argument that the Preamble could be read as placing implied limitations or immunities from amendment.

He concluded that every part and every provision of the Constitution was within the purview of wide and unfettered power of amendment of the Constitution conferred by Article 368. No inherent limitations on the amending power could be spelled out so as to develop a theory of keeping the essential features or the fundamental principles of the Constitution beyond the power of amendment.

Notes

**(b) *Preamble as a source of interpretation of other Statutes framed under the Constitution.***

Whether it is the Constitution that is expounded or the constitutional validity of a Statute that is considered, a cardinal rule is to look to the Preamble Constitution as the guiding light and to the Directive Principles of State Policy and as the book of interpretation of the constitution. The Preamble embodies and expresses the hopes and aspirations of the people. The Directive Principles set out proximate goals. When we go about the task of examining statutes against the Constitution, it is through these glasses that we must look, distant vision or near vision. The Constitution being sui generis, where constitutional issues are under consideration, narrow interpretative rules which may have relevance when legislative enactments are interpreted may be displaced. Originally the Preamble to the Constitution proclaimed the resolution of the people of India to constitute India into "a Sovereign Democratic Republic" and set forth "Justice, Liberty, Equality and Fraternity", the very rights mentioned in the French Declaration of the Rights of Man as our hopes and aspirations. That was in 1950 when we had just emerged from the colonial-feudal rule. Time passed. The people's hopes and aspirations grew. In 1977, the Forty-Second Amendment proclaimed India as a Socialist Republic. The word "Socialist" was introduced into the Preamble to the Constitution. The implication of the introduction of the word "Socialist", which has now become the centre of the hopes and aspiration of the people — a beacon to guide and inspire all that is enshrined in the Articles of the Constitution — is clearly to set up a "vibrant throbbing socialist welfare society" in the place of "feudal exploited society". Whatever Article of the Constitution it is that we seek to interpret, whatever Statute it is whose constitutional validity is sought to be questioned, we must strive to give such an interpretation as will promote the march and progress towards a socialistic democratic State. For example, when we consider the question whether a Statute offends Article 14 of the Constitution we must also consider whether a classification that the legislature may have made is consistent with the socialist goals set out in the Preamble and the Directive Principles enumerated in Part IV of the Constitution. A classification which is not in tune with the Constitution is per se unreasonable and cannot be permitted.

The Preamble to the Constitution has relevance and significance in the interpretation of other laws. That the Preamble acts as beacon light guiding the interpretation of other law is a rule recognised in *'Kesavananda Bharti' case*.

According to Kelsen: "Preamble serves to give a Constitution a greater dignity and efficacy." Initially the Preamble was utilised by courts in interpreting social legislations. And later, the net widened.

The validity of the Kerala Fisherman Welfare Fund Act, 1985 was upheld in *'Kolutbara Exports Ltd. v. State of Kerala'* on the grounds that the aim of law

was to provide social security and welfare to the Kerala fisherman and that this was justified as it was in accordance with the objectives contained in the Preamble.

The Supreme Court has also used the concept of equality as found in the Preamble in the interpretation of tax laws. In *'Sri Srinivasa Tbeatre v. Govt. of T.N.'* the Court said that Parliament has been given more freedom in the case of taxing statutes in order to decide who should pay more taxes, to remove the inequalities that prevail in this country, as per the goal of equality as envisaged in the Preamble.

In a more recent decision, *P.Ramachandra Rao v. State of Karnataka,* the Court has reiterated the right to speedy trial as a fundamental right under Article 21, and has used the concept of justice as found in the Preamble to the Constitution to strengthen this right.

In the field of labour and company law, the Court, in the case of *'National Textile 'Workers' Union v. P.R. Ramakrishanan',* used the right of justice as assured in the Preamble to the Constitution to give workers of a company a right to be heard in a winding-up petition.

In *'Randhir Singh v. Union of India'* the Supreme Court construed Articles 14 and 16 in the light of the Preamble and Article 39(*d*) of the Constitution.

In *'D.S. Nakara v. Union of India'* the Court observed the Preamble to the Constitution is the floodlight which illuminates the path to be pursued by the State to set up a Sovereign, Socialist, Secular and Democratic Republic, and decided the case in favour of the pensioners who had been denied the enhanced pensionary benefits under an order issued by the Central Government.

In *'Sanjit Roy v. State of Rajasthan',* the Court held that when a person is forced to work on wages less than what is prescribed as minimum is "forced labour" under Article 23 and basically contrary to the principle laid down in the Preamble.

In *'Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.',* the Court relied on the Preamble and Article 39(*b*) for upholding the validity of the Coking Coal Mines (Nationalistaion) Act, 1972 and observed that the Act was designed to achieve the egalitarian principle of social and anomic justice for all. Justice Chinnappa Reddy, observed—

> "Scale of justice are just not designed to weigh competing social and economic factors. In such matters legislative wisdom must prevail and judicial review must abstain."

### (c) *International Documents/Treaties Conventions/Declarations as aid to Interpretation of the Preamble.*

The Judges in India have referred to international legal documents and treaties in order to do justice in the absence of any law or authority available on the point. In *Madhu Kishwar v. State of Bihar* the Court made use of the Vienna Convention on the Elimination of all Froms of Discrimination Against Women (CEDAW) ratified by UNO on 18-12-1979 to uphold the right of succession for tribal woman over which there was some amount of legal controversy. The concept of justice and equality spoken of in the Preamble was given a new dimension by the Supreme Court observing that Article 2(3) of CEDAW enjoins the Supreme Court to breathe life into the dry bones of the Constitution, International Conventions and the Declaration Human Rights act, to prevent gender-based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights. Women are half of the lowest of the low. It is mandatory to render them socio-economic justice so as to ensure their dignity of person, so that they be brought into the mainstream of the national life. In *Vishaka v. State of Rajasthan* the Supreme Court laid down guidelines on sexual harassment of woman in the work place on the basis of CEDAW in search of gender justice flowing from "justice" and "equality" as employed in the Preamble. In *'Kirloskar Brotbers Ltd. v. ESI Corpn.'* , the Court used the Universal Declaration of Human Rights, 1948 and the International Covenant on Civil and Political Rights to reaffirm the duty of the State as regards its welfare role.

## INTEXT QUESTIONS 18.5

1. Analyse briefly the role of Preamble as interpreter of the provisions of Constitution itself.
2. "The Preamble acts as an aid to the interpretation of other Statutes." Is this statement true or false?
3. "The International Documents/Treaties/Conventions/Declarations act as aid to the interpretation of the Preamble." Is this statement true or false?

## WHAT YOU HAVE LEARNT

The document containing laws and rules which determine and describe the form of the government and the relationship between the citizens and the government is called a Constitution. In short, Constitution contains law and principles according to which a State is governed.

A Government which is controlled or ruled or limited by a Constitution, is called a constitutional government.

'Constituionalism' means belief in a constitutional govenment or belief in consitutional principles. Constitutionalism establishes a constitutional govenment which is controlled or ruled by a written constitution.

The Preamble of the Constitution explains the objectives of the Constitution in two ways; one about the structure of govenance and the other, about the ideals to be achieved by India. It is because of this that the Preamble is considered to be the key to the Constituion. In fact, the 'objectives' spesified in the Preamble contains the basic structure of the Constitution.

The Premeable acts as interpreter of Constitution and other Statues formed under the Constitution. The Preamble to the Constitution has played a predominant role in shaping the density of the country during the last six decades.

## TERMINAL QUESTIONS

1. What is meant by the 'Constitution'?
2. Examine in brief the characteristics of a Constitutional Govenment.
3. Describe briefly the term 'Constitutionalism'.
4. Examine the role of Preamble in interpreting the Constitution.
5. Discuss briefly Preamble as an aid in interpreting the other Statutes framed under the Constitution.
6. "The Preamable is an integral Part of the Constitution." Examine this statement in the light of relevant cases.
7. Explain briefly the constitutional values mentioned in the Preamble which gives us dignity of existence as a Nation in the International Community.

## ANSWER TO INTEXT QUESTIONS

### 18.1

1. Constitution contains the Laws and the Principles according to which a State is governed. The Constitution of a country provides the basis for governance of country.
2. 'Constitutionalism' means belief in a Constitutional Government or beliefs in Constitutional Principles. 'Constitutionalism' establishes a constitutional government which is controlled or ruled by a written Constitution.
3. Source of Authority of the Constituion.

**18.2**

1. Basic Structure
2. Objectives

**18.3**

1. Keshavananda Bharti Case
2. Berubari Case
3. Keshavananda Bharti Case.

**18.4**

1. Refer to 18.4
2. True

**18.5**

1. Refer to 18.5 (a)
2. True
3. True.

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# FUNDAMETAL RIGHTS AND DUTIES

Like other modern Constitutions of most of the democratic countries, the Constitution of India, too, contains a number of Fundamental Rights for its citizens. These Fundamental Rights are not only guaranted by the Indian Constitution, but also are more elaborate and real than those found in other Constitutions of the world. In this chapter, we will study about vision of Fundamental Rights enshrined upon in part third of the Constitution of India.

## OBJECTIVES

After studying this lesson, you will be able to:

- explain the nature of Fundamental Rights;
- list various freedoms given under the Right to Freedom besides ensuring the liberty of the individual;
- identity the safeguards against deprivation of life and personal liberty;
- appreciate the role of the Right to Freedom of Religion which forms the very basis of secularism in India;
- appreciate that Cultural and Educational Rights which are essential for co-existence in a diverse and plural society, especially for the Minorities;
- classify the 'Writs' given under the Right to Constitutional Remedies as a safeguard against various types of violation of Fundamental Rights;
- evaluate the usefulness of different types of 'Writs';
- justify the limitations imposed on the enjoyment of Fundamental Rights;
- examine the relationship between our rights and duties;
- list the Fundamental Duties given in the Constitution; and
- appreciate the significance of Fundamental Duties.

Notes

## 19.1 NEED AND IMPORTANCE

Looking back at the history of Fundamental Rights, we know that the United States of America was the first country to incorporate these rights in its Constitution. Germany adopted them in 1919 through Weimer Constitution and so did Ireland and Russia in 1922 and 1936 respectively. During our freedom struggle, our national leaders realised the importance of rights for the people. So, there came the proposed bill of rights demanded by the 'Nehru Committee' in the year 1928. When India became independent, the Constituent Assembly did include the rights that would be specially protected and called them 'Fundamental Rights'. The word fundamental emphasises the following points:

- the Constitution of India has separately inserted them;
- the Constitution has made special provisions for their protection;
- these rights are Justiciable; and
- these rights are part of the Constitution and have Constitutional Status.

Let us try to understand how Fundamental Rights are different from ordinary rights given under a Law enacted by the Legislature.

(a) Unlike Fundamental Rights, the ordinary rights are not protected and guaranteed by the Constitution of the country.

(b) Fundamental Rights can be changed only by amending the Constitution where as the legislature is empowered to change ordinary laws by an ordinary process of law making.

(c) Fundamental Rights cannot be violated by any organ of the government.

(d) In case the Fundamental Rights are violated, judiciary has the power and responsibility to protect them. There is no such guarantee in the case of ordinary laws.

### Characteristics of the Fundamental Rights

- The Fundamental Rights guaranteed under the Constitution stand higher than ordinary laws.
- The Supreme Court and the High Courts have been given the power to enforce Fundamental Rights through the writs, orders or directions.
- Besides some rights meant only for the citizens, there are rights for the non-citizens also.
- Many restrictions have been placed on the enjoyment of Fundamental Rights. It implies that they are not absolute.
- The courts are free to investigate whether the restrictions imposed by the government are reasonable or not.

- The Fundamental Rights can be restricted or suspended under special circumstances when an emergency is imposed.

**Do you know**

**Power of the Parliament to Amend Fundamental Rights**

- The Supreme Court of India declared that the Fundamental Rights are outside the amendatory power of the Parliament of India as laid down in Article 368 of the Constitution. This Judgement was given in Golak Nath Case.
- Under Twenty-fourth and Twenty-fifth Amendment of the Constitution, the Parliament was again given the power to amend Fundamental Rights.
- The Supreme Court also conceded that the Parliament has got the right to ammend the 'Constitution', in its Judgement in 'Keshavanand Bharti' case.
- The Forty-Second Amendment further asserted the right of the Parliament to amend the Fundamental Rights.
- In its judgement on Minerva Mills case in 1980, the Supreme Court of India declared that anything that destroys the balance between Part-III and Part-IV of the Constitution will be considered as destroying basic structure of the Constitution such as unconstitutional.

## INTEXT QUESTIONS 19.1

Write true or false against each of these statements:

(a) The basic structure of the Constitution cannot be changed by the Parliament. (True/False)

(b) There is hardly any difference between ordinary rights and the Fundamental Rights. (True/False)

(c) Nehru Committee demanded fundamental rights in 1928. (True/False)

## 19.2 FUNDAMENTAL RIGHTS

Originally, seven Fundamental Rights were enshrined in Part-III of the Indian Constitution. These included the Right to Property which was removed from the list of Fundamental Rights by the 44th Constitutional Amendment. Now there are only six Fundamental Rights. These are:

Notes

A. Right to Equality;

B. Right to Freedom;

C. Right against Exploitation;

D. Right to Freedom of Religion;

E. Cultural and Educational Rights;

F. Right to Constitutional Remedies.

## A. Right to Equality (Articles 14–18)

(i) **Equality before the Law** to all persons, citizen and aliens means that the state shall not deny to any body equality before the law or equal protection of the law within the territory of India. It is covered under **Article 14** of the Constitution and prevents discrimination only by the state and not by the individual.

(ii) **Prohibition of Discrimination** under **Article 15** provides that no discrimination can be made against a citizen on the grounds of race, religion, caste, sex or place of birth. It implies that every citizen has access to shops, public place or the use of wells, tanks or roads etc. This Fundamental Right is necessary to bring about social equality.

(iii) Equality of opportunity under **Article 16** means that all the citizens have equal opportunities in matters of employment or appointment to any office under the state. It implies that employment will be given only on the basis of merit and qualification.

**Exceptions**

(a) When residential qualifications are prescribed for certain jobs under the State Governments.

(b) When certain posts are reserved for scheduled castes, sheduled tribes or other backward classes of citizens.

(c) For employment to an office in a religious or minority community institutions as to be filled up by a person of that community.

(iv) Untouchability has been abolished and its practice in any form is prohibited.

It has been made a punishable offence under **Article 17**. Millions of Indians who were ill-treated, discriminated and looked down upon in society are no more untouchables. Efforts are always on for the upliftment of their social status. It was Mahatma Gandhi's utmost desire to root out the evil of untouchability. But it is very unfortunate that this evil is still seen in some parts of the country.

(v) **Article 18** prohibits the state from awarding any title except a military or academic distinction. Before we attained independence, the Britishers used to award titles to those who were loyal to them and served their interests. Titles like Rai Bahadur, Rai Sahab, Khan Bahadur, Sir etc. not only created social distinction but also divided the Indian society. Therefore, they have been abolished. Instead, the President of India can award national honours like 'Bharat Ratna', 'Padma Vibhushan', 'Padma Bhushan' and 'Padma Shree' to eminent citizens in any field such as public, social, academic or sports.

Similarly, military and bravery awards are also given for service or sacrifice by the military or paramilitary forces.

## INTEXT QUESTIONS 19.2

**Write True or False:**

1. Fundamental Rights are enshrined in Part-III of the Constitution. (True/False)
2. Right to Equality established Equality before Law. (True/False)
3. Article-15 provides that no discrimination can be made against a citizen an the grounds of race, religion, caste or place of birth. (True/False)

### B. Right to Freedom (Articles 19-22)

The Right to Freedom constitutes the core of civil liberty and protects the individual from the repressive acts of the executive.

Article 19 guarantees six freedoms which are essential for the development of one's personality and for the successful working of the democracy.

These freedoms are :

(i) Freedom of speech and expression. [Art.19(a)]

(ii) Freedom to assemble peacefully and without arms, [Art.19(b)]

(iii) Freedom to form associations and unions. [Art.19(c)]

(iv) Freedom to move freely through out the territory of India. [Art.19(d)]

(v) Freedom to reside and settle in any part of India. [Art.19(e)]

(vi) Freedom to practise and profession or to carry on any occupation, trade or business. [Art.19(g)]

Although the framers of the Indian Constitution were strongly committed to various forms of fundamental freedoms which are absolutely necessary in a free

democracy, yet they believed that all such freedoms should not be absolute or uncontrolled. Therefore, certain reasonable restrictions were imposed so that freedoms may not lead to anarchy, disorder and even disintegration of the country.

- The State is empowered to impose reasonable restrictions in the interest of the security of the state, friendly relations with foreign countries, public order, or decency or morality or in relation to contempt of court, defamation or incitement to an offence and maintenance of sovereignty and integrity of the country.
- The freedom under Article 19(b) is subject to two reasonable restrictions:
  (i) Meetings, rallies and procession should be peaceful
  (ii) The participants should not carry any weapon.
- The freedom, under Article 19(c), to form associations or unions is essential for the successful working of democracies, to have the role of political parties is indispensable. But when some illegal, immoral or conspirational associations are formed, the very integrity and sovereignty of the country may face the danger. Therefore, the state can disallow such formations.
- The freedoms under Article 19 (d, e, f ) are also subject to the authority of the state to impose certain reasonable restrictions:
  (i) in the interest of the general public;
  (ii) for the protection of the Scheduled Tribes;
  (iii) to prevent spread of infectious diseases.
- The freedom to practise any profession or to carry on any occupation, trade or business under Article 19(g) does not mean the freedom to take up jobs or trading which are certainly injurious to the society. Gambling, prostitution, trading drugs etc. are not permitted. Similarly, functioning as a doctor without essential qualifications is not permissible.

Constitution of India under Articles 20-22 provides safeguards to individuals against arbitrary action by the State. Therefore, the Right to life and personal liberty is of utmost importance and very essential to the enjoyment of all other rights.

- **Article 20** deals with protection in respect of conviction for offences
  (1) No person can be convicted for any offence except for violation of a law in force at the time of the commission of the act charged as an offence, none be subjected to a punishment greater than that which might have at the time of the commission of the offence.
  (2) No person can be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence can be compelled to witness against himself.

- Usually described as rules of natural justice, Article 20 grants protection against arbitrary arrest, and excessive punishment to any person who commits an offence.
- **Article 21** lays down that, no person shall be deprived of his life or personal liberty except according to procedure established by law. This Article guarantees freedom of life to every Indian citizen against arbitrary interface by the state. It was during the internal emergency (1975-77) that the state had acquired unprecedented powers to limit the freedom of the people. Therefore, 44th Amendment was passed to avoid the recurrence of such a situation. According to this Act, the Fundamental Right to life and personal liberty must continue without any interference even if the emergency is imposed.

**Do you know**

### Right to Education

The long standing demand of having education as a Fundamental Right was met with in 2002 by the 86th Amendment of the Indian Constitution and consequently enactment of Right to Education Act 2009. The Article 21A states that the State shall provide free and compulsory education to all children of the age group of 6-14 years in such a manner as the state may, by law, determine. This implies that all children within the said age group can claim compulsory and free education as a matter of Fundamental Right.

**Article 22** grants protection against arbitrary arrest and detention in two ways:

(a) (i) No one can be arrested without being told the grounds on which he/she has been arrested.

(ii) The person arrested must be presented before the nearest magistrate within 24 hours of the arrest.

(iii) The arrested person has the right to defend himself by a lawyer of his/her own choice.

Aliens or citizens arrested under Preventive Detention are not entitled to such safeguards.

(b) **Preventive Detention** means detention of a person in order to prevent him from committing a crime. If there is an apprehension that a person is likely to engage in some wrongful activity or commit an offence, he/she may be detained for a limited period of time not more than three months. After three months such a case is reviewed by an Advisory Board.

Preventive Detention Act had been criticised by several eminent personalities due to its widespread abuse, like for detaining even political opponents. So, it was allowed to lapse at the end of 1969. In December 1971, a new law was passed by the Parliament to deal with anti-national elements at the time of Bangladesh war. This was popularily known as MISA (i.e. the Maintenance of Internal Security Act). Inspite of the assurance that MISA would not be used against political opponents, a large number of leader, workers, sympathisers were detained all over the country when a state of emergency was declared in June 1975. So much so, that people were denied even the right to go to the court.

As a result, the provision of regarding preventive detention were amended by the Janta Government and the authority of the state was restricted by the 44$^{th}$ Amendment in 1978.

The present situation regarding preventive detention is that no persons can be detained ordinarily for more than two months without references to the Advisory Board.

## INTEXT QUESTIONS 19.3

Match the following freedoms to their refractive Articles:

| | | | |
|---|---|---|---|
| (i) | Freedom to form associations | (a) | 19(a) |
| (ii) | Freedom of assembly | (b) | 19(g) |
| (iii) | Freedom of expression | (c) | 19(d) |
| (iv) | Freedom of movement | (d) | 19(c) |
| (v) | Freedom of profession | (e) | 19(b) |

### C. Right Against Exploitation (Articles 23-24)

Articles 23 and 24 of the Indian Constitution deal with the Right against Exploitation. The right aims at preventing exploitation of the weaker, vulnerable and underprivileged sections of the society. This right is in keeping with the objective of 'dignity of the individual', mentioned in following articles two of the Indian Constitution.

(i) **Article 23** places a ban on traffic in human beings, 'begar' and similar other forms of forced labour. No person can be compelled to work without payment. But this does not prevent the state from imposing compulsory service for public purposes without any discrimination.

(ii) **Article 24** prohibits employment of children below the age of 14 years in factories, mines or any other hazardous jobs. Any violation of this provision

is a punishable offence in accordance with the law. It is very unfortunate that employing small children as domestic servants is a common practice in India. This type of exploitation by the rich is not strictly covered by this Article because domestic work is not considered 'work in a factory' Similarly, employment of children in both the organised and unorganised sectors is so rampant that factories, shops, small hotels or dhabas etc are flooded with the children of tender age.

## D. Right to Freedom of Religion (Articles 25–28)

Articles 25-28 of the Indian Constitution guarantee religious freedom to the citizens of India. India being a secular state, allows full freedom to all its citizens to have faith in any religion and to worship the way they like but without interfacing with or offending the religious belief and sentiments of others.

(i) **Under Article 25,** all people have freedom of conscience and the right to profess, practise and propagate any religion subject to the norms of public order, morality and health. The state has the privilege to restrict any economic social, political or other activity which may be associated with religious practice.

(ii) **Article 26,** It recognises the right of every religious denomination to manage its own affairs and to own and acquire as well as to administer properties for religious or charitable purposes.

(iii) **Article 27** lays down that no person shall be compelled to pay any taxes. The proceeds of which are to be appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

(iv) **Article 28** deals with freedom as to attendance at religious instruction or religious worship in certain educational institutions. According to this Article:

(1) no religious instruction shall be imparted in any educational institution wholly maintained out of state funds.

(2) the above restriction mentioned in clause (i) does not apply to an educational institution which is administered by the state but has been established denominational trusts or organisations which require that religious instruction shall be imparted in such institutions.

(3) religious instructions can be imparted in those institutions which are not wholly maintained out of the state funds. But even in these institutions, no child can be compelled to receive religious instruction.

All the above mentioned provisions given in the Constitution of India aim at full religious freedom without any interface by the state, or by any other community. India, therefore, is a secular state.

Notes

## INTEXT QUESTIONS 19.4

Write true or false against each of these statements:

(i) **Article-24 of the Constitution** prohibits employment of Children below the Age of 14 years in factories. (True/False)

(ii) Indian Consitution does not quantee religious freedome to all its Citizens. (True/False)

(iii) Every Indian citizen is free to change his/her religion if he/she so desires. (True/False)

### E. Cultural and Educational Right (Articles 29 and 30)

Article 29 and 30 of the Indian Constitution assure every citizen of India, especially the minorities, to conserve their culture, language and script.

**Do you know**

Articles 29 and 30 do not promise Right to Education which is separately provided by 86$^{th}$ Amendment of the Indian Constitutions. These two articles take care of cultural and educational interests of the religious and linguistic minorities.

(i) **Articles 29** lays down that any section of the citizen residing in the territory of India having a distinct language, script or culture of its own shall have the right to conserve the same.

No citizen shall be denied admission into any educational institution maintained by the state or funded by the state on grounds only of religion, race, caste, language or any of them.

(ii) **Article 30** guarantees the minorities their right to establish and administer educational institutions. While granting aid to educational institutions, the state shall not discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

### F. Right to Constitutions Remedies (Art.32)

It is this right which was considered to be the heart and soul' of the Constitution of India by Dr. B.R Ambedkar, the chairman of the Drafting Committee. In order to be effective, the Fundamental Rights require a judicial sanction behind them. Besides listing Fundamental Rights, the constitution makers have also presented remedies against the violation of these rights. It is under Article 32 that the

Constitution has guaranteed the people to move to the High Court and the Supreme Court for the enforcement of Fundamental Rights. These Courts can issue order and give directive to the government for the enforcement of rights. Such directives or special orders are known as Writs. Writs are of five types:

(i) **Habeas Corpus:** A Writ of Habeas Corpus means that the arrested person should be presented before the court so that the court may examine whether the arrest made is lawful or not. In case the arrest made is unlawful, the court can order to set free the arrested person. This writ is regarded as the most valuable right for the protection of personal liberty.

(ii) **Mandamus:** This Writ is issued when the court finds that a particular official is ignoring to perform his/her legal duty and thereby infringing upon the right of some other individuals or individual.

(iii) **Prohibition:** The Writ of prohibition is issued by a higher court asking a lower court not to proceed in a case which is beyond its jurisdiction.

(iv) **Quo Warranto:** If the court finds that a person is holding an office for which he/she is not entitled or to a person who is performing a function for which he/she is not lawfully entitled to, the court may stop that person from holding that office and exercising that function.

(v) **Certiorari:** This Writ is issued asking a lower court to transfer a matter pending before it to the higher court so that it may be able to deal with the case more effectively.

**Do you know**

The difference between the Writ of Prohibition and the Writ of Certiorari is that in the case of former a lower court is asked to stop dealing with the case, where as is the case of later writ, the superior court requires the lower court to supply it with some information, records or the whole proceedings for further hearing.

Although our Fundamental Rights are justiciable, yet they can be suspended during the state of Emergency. As soon as the state of Emergency is declared under Article 352 (war or internal armed rebellion), all the freedoms under Articles 19 automatically stand suspended

Besides this, Articles 359 authorises the Parliament to issue a separate order during emergency to suspend even the Right to Constitutional Remedies. It implies that no one can move to the court for any remedy and all Fundamental Rights except right to life and personal liberty are virtually stand suspended.

Notes

## INTEXT QUESTIONS 19.5

Answer the following question:

(a) Which Writ can protect a detained person from an unlawful arrest ?

(b) Which writ authorises a higher Court to stop from further proceeding in a particular case ?

(c) The transfer of a case from a lower court to a higher court is enforced under which writ ?

(d) Name the writ which can help a candidate declared pass by the university but being denied his/her pass certificate.

(e) Mr. A has been promoted as well as transferred to replace Mr. B. But Mr. B. uses delaying tactics and does not vacate the post to join somewhere else. Identify the writ which may help Mr. A to join his new post.

## 19.6 FUNDAMENTAL DUTIES

Right become meaningless if there are no duties to perform, If we do not perform our duties as a citizen in whatever capacity we are, other cannot enjoy their rights, Not only this, even the state will not be able to properly discharge its duties in protectecting us and fulfilling our needs like education, health, housing, water etc. Therefore, it was realised that Fundamental Duties be included in the Constitution of India.

The 42nd Constitutional Amendment Act adopted in 1976 provided for eleven important Fundamental Duties. They are listed in Part IV-A of the Constitution under Article 51-A. Unlike Fundamental Rights these duties are non-justiciable. Even then they are significant in many respects. It would have made Indian citizens more responsible and wide awaked as part of the largest democracy of the world.

The following duties have been listed in Article 51(A) of the Constitution:

**Fundamental Duties –** It shall be the duty of every citizen of India–

(a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;

(b) to Cherish and follow the noble ideals which inspired our national struggle for freedom;

(c) to uphold and protect the sovereignty, unity and integrity of India;

(d) to defend the country and render national service when called upon to do so;

(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities, to renounce practices derogatory to the dignity of women;

(f) to value and preserve the rich heritage of our composite culture;

(g) to protect and to improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures;

(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;

(i) to safeguard public property and to abjure violence;

(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement; and

(k) who is a parent or guardian to provide opportunities for education to his/her child or, as the case may be, ward between the age of six and fourteen years.

Initially, there were ten Fundamental Duties which were introduced in 1976. But, now they are eleven. The last one was added in 2002 by the 86$^{th}$ Amendment of the Constitution along with the Right to Education Act under Article 21-A. As such the duty mentioned as (k) is complimentary to the Right to Education. Therefore, it is now the duty of the parents to make best use of the Right to Education.

## INTEXT QUESTIONS 19.6

1. How many Fundamental Duties have been mentioned in Article 51-A of the Constitution of India?
2. List any three Duties enshrined in the constitution of India.

## WHAT YOU HAVE LEARNT

Part Three of the Indian Constitution contains some basic rights which are essential for the development of the personality and make life worth-living. Since these rights have been guaranteed by the Constitution, they are called Fundamental Rights. They are protected and enforced by the Courts.

The Fundamental Rights enshrined in the Indian Constitution are:

(i) Right to Equality;

(ii) Right to Freedom;

Notes

(iii) Right against Exploitation;

(iv) Right to Freedom of Religion;

(v) Cultural and Educational Right; and

(vi) Right to Constitutional Remedies.

The Fundamental Rights are justiciable but not absolute. Many reasonable restrictions have been imposed on their enjoyment in the interest of security, health, public order etc. But sometimes the restrictions are misused by the government due to political reason. In such circumstances, the Supreme Court and the High Courts have been given the power to check the violation of Fundamental Rights by the State or by the individual. Under the Right to Constitutional Remedies, the Court can protect or restore Fundamental Rights of individual.

Rights without duties have no meaning. Therefore, the Constitution lays down some Fundamental Duties in Part IV-A of the Constitution under Article 51-A. They are eleven in number. The eleventh duty which was added later in 2002 is related for the fulfillment of Right to Education. So, it is for the parents or guardians to provide opportunities of education to their children between the age group of 6-14 years.

## TERMINAL QUESTIONS

1. List the Fundamental Right enshrined in Part III of the Indian Constitution.
2. Mention one restriction each imposed on any four freedoms given under the Right to Freedom.
3. What is the importence of Fundamental Rights ?
4. Explain the Right to Equality. How far has it succeeded in bringing about equality and unity in the country?
5. Under what circumstances can the Fundamental Rights be suspended? How far is the suspension of Fundamental Rights justified?
6. What is a writ?
7. Fundamental Rights are justiciable but not absolute. Briefly explain the statement.
8. "Judiciary is the protactor and guardian of our Fundamental Right's Explain.

## ANSWER TO INTEXT QUESTIONS

### 19.1

(a) True

(b) False

(c) True

### 19.2

1. True
2. True
3. True

### 19.3

(i) 19(c)

(ii) 19(b)

(iii) 19(a)

(iv) 19(d)

(v) 19(g)

### 19.4

(i) True

(ii) False

(iii) True

### 19.5

(a) Habeas Corpus

(b) Prohibition

(c) Certiorary

(d) Mandamus

(e) Quo Warranto

### 19.6

1. Eleven
2. (i) To defend the country and render national service when called upon to do so; and

   (ii) To safeguard public property and adjure violence.

Notes

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20

# DIRECTIVE PRINCIPLES OF STATE POLICY

Part IV of the Constitution of India (Article 36–51) contains the Directive Principles of State Policy (DPSP). These principles aim at ensuring socio-economic justice to the people and establishing India as a Welfare State. The founding fathers of Indian Constitution were aware of the fact that Independent Indian State was going to face many challenges. After colonial rule for almost two hundred years, country and the society was left with widespread poverty, hunger and with deep rooted socio-economic inequalities. The framers of the Constitution felt that certain policy directions, guidelines or instructions for the governance of the country were required to handle these problems. Legislature, executive and administration of the Independent India were expected to exercise their powers in accordance with the direction and guidelines given in this part of the Constitution.

## OBJECTIVES

After studying this lesson, you will be able to:

- understand the meaning and nature of Directive Principles of State Policy;
- explain the philosophical basis of the Directive Principles;
- classify the Directive Principles of State Policy;
- appreciate the role of Directive Principles towards making India a Welfare State;
- appreciate the importance of Directive Principles of State Policy in Promoting socio-economic equality;
- distinguish between Fundamental Rights and Directive Principles of State Policy; and
- assess the role of government in implementing DPSP.

## 20.1 DIRECTIVE PRINCIPLES OF STATE POLICY: MEANING AND NATURE

Directive Principles are certain ideals, particularly aiming at socio-economic justice, which according to the framers of the Constitution, Indian State should strive for.

Dr. B. R. Ambedkar described Directive Principles as a "Novel Feature" of the Constitution. They are in the nature of general directions, instructions or guidelines to the State. Directive Principles embody the aspirations of the people, objectives and ideals which Union and the State governments must bear in mind while making laws and formulating policies.

According to L.M. Singhvi; the Directive Principles are the life giving provisions of the Constitution. They represent the philosophy of social justice incorporated in the Constitution of India. Although Directive Principles are non-justiciable or they are not legally binding by any Courts, they however, are fundamental in the governance of the country. They lay down a code of conduct for the legislatures, executives and administrators of India to discharge their responsibilities in tune with these ideals.

## 20.2 PHILOSOPHICAL BASE OF THE DIRECTIVE PRINCIPLES

Directive Principles in the Indian Constitution are taken from the Constitution of Ireland. But the idea and philosophy of these principles can be traced back to French declaration of human rights, American declaration of independence, liberal as well as socialist philosophy of 19$^{th}$ century and our own, Gandhian Concept of Sarvodaya.

Ivor Jennings has observed that philosophy underlying most of the Directive Principles, is "Fabian Socialism". Many of our Constitution makers were under the great influence of Socialism and Gandhism. So, through these provisions and principles they laid down the Socialistic Pattern of Society and Gandhian Ideal State as the objective, which the Indian State should strive to achieve. Article-37 of the Constitution, states about the application of the Directive Principles, which says that the provisions contained in this part (Part-IV) shall not be enforceable by any Court but principles there in laid down, are neverthless fundamental in the governance of the country and it shall be the duty of the State to apply these principles while making the laws.

**Do you know**

- Part-IV of the Constitution of Indian (Article 36-51) provides The Directive Principles of State Policy.
- The Directive Principles contained in Indian Constitution are taken from Irish Constitution, The Irish themselves had, however, taken the ideas from the Constitution of Spain.
- Similar guidelines were provided in the form of instruments of instruction in the Government of India Act, 1935.
- Directive Principles of State Policy aim at making India a Welfare State and thus strike a balance between liberal individualist and socialist ideology.

## INTEXT QUESTIONS 20.1

**Fill in the blanks**

(i) Directive Principles make India a …… State. (Socialist/Welfare)

(ii) Directive Principles are …….. . (non justiciable/justiciable)

(iii) Thoughts and Ideas of ……. have been incorporated in the Constitution in the form of Directive Principles of State Policy.
(C. Rajgopalachari/Mahatma Gandhi)

(iv) Socialistic pattern of society can be achieved by…… distribution of wealth. (unequal/equitable)

(v) ……..System has been abolished completely in India.
(Caste/Capitalist/Zamidari)

## 20.3 CLASSIFICATION OF THE DIRECTIVE PRINCIPLES OF STATE POLICY

The Directive Principles are classified on the basis of their ideological source and objectives. For the sake of making their study convenient, we can broadly place them in four categories, These are;

1. Economic and Social Principles;
2. Directives Based on Gandhian Principles;
3. Directive Principles relating io International Peace; and
4. Miscellaneous.

## 1. The Economic and Social Principles

A large number of Directive Principles are socialistic in nature and dedicated to achieve social and economic welfare of the people with the objective to establish India as a Welfare State. Some of these principles are as follows:

(i) The State shall strive to promote the welfare of the people by securing and protecting a social order in which justice, social, economic and political, shall inform all institutions of national life (Article 38).

(ii) Articles 39 says that State shall in particular, direct its policies towards securing:

  (a) right to an adequate means of livelihood to all the citizens;

  (b) the ownership and control of material resources shall be organised in a manner to serve the common good;

  (c) the operation of the economic system does not result in the concentration of the wealth to the common detriment. In other words state shall avoid concentration of wealth in few hands;

  (d) equal pay for equal work for both men and women;

  (e) the protection of the strength and health of the workers; and

  (f) that the childhood and youth are not exploited;

(iii) Article-42 declares that, the State shall make provisions for securing just and humane conditions of work and for maternity relief.

(iv) According to Article-43, the State shall endeavour to secure to all workers a living wage and a decent standard of life, while article 43A says that the State shall take steps to secure the participation of workers in the management of industries.

## 2. Directives Based on Gandhian Principles

Mahatma Gandhi was the main guiding force during our freedom struggle. He had tremendous influence over the common people as well as framers of the Constitution. There are certain directives principles as aiming at implementing Gandhian Principles. These are as follows;

(i) State shall take steps to organise village panchayats as units of Self-Government (Article-40)

(ii) The State shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas, (Article-43)

(iii) Article-45 provides for free and compulsory education to all children till the age of 14 years. This original provision was amended by 86$^{th}$ Constitutional Amendment Act 2002, it now declares that, "the State shall endeavour to provide early childhood care and education for all children until they complete the age of 14 years." (Article 21-A)

(iv) Article-46 lays down that the State shall promote educational and economic interests of the weaker sections of the people particularly that of the Scheduled Castes (SCs) and Scheduled Tribes (STs) and other weaker sections.

(v) Article-47 states that State shall take steps to improve public health and prohibit consumption of intoxicating drinks and drugs that are injurious to health.

(vi) Article-48 says that, State shall take steps to prohibit slaughter of cows, calves and other milch and draught cattle.

### 3. Directive Principles Relating to International Peace and Security

A year after the end of the Second World War, constitution making process began in India. It was obvious that members of our Constituent Assembly were deeply concerned about international peace and security. Through Directive Principles of State Policy they tried to ensure that Government of free India should render active cooperation for world peace and security. Article 51 declares that to establish international peace and security the State shall endeavour to–

(i) promote international peace and security;

(ii) maintain just and honourable relations with the nations;

(iii) foster respect for international law and treaty obligations; and

(iv) encourage settlement of international disputes by arbitration.

### 4. Miscellaneous Directive Principles

The fourth category of Directive Principles Contains some general subjects which are sometimes termed as liberal principles. These are as follows;

(i) Article-44: The State shall endeavour to secure for the citizen a uniform civil code through the territory of India.

(ii) Article-48A: Directs the State to protect and improve the environment and to safeguard the forests and wildlife of the country.

(iii) Article-49: State should protect every monument or place of artistic or historic interest.

(iv) Article-50: The State shall take steps to separate judiciary from the executive in the public services of the State.

**Do you know**

- The 42nd Constitutional Amendment, 1976 introduced certain changes in the part-IV of the Constitution by adding new directives like:
  - (i) Article-39A – State to provide free legal aid to poor.
  - (ii) Article-43A – Participation of workers in management of Industries.
  - (iii) Article-48A – Directs the State to protect and improve environment.

- The 44th Constitutional Amendment, 1978 inserted Section-2 to Article 38 which declares that; "The State in particular shall strive to minimise economic inequalities in income and eliminate inequalities in status, facilities and opportunities not amongst individuals but also amongst groups"
- The 44th Constitutional amendment, 1978, eliminated, Right to property from the list of Fundamental Rights. It was considered as an hindrance in the path of implementing Directive Principles.

## INTEXT QUESTIONS 20.2

For each multiple choice question given below, choose the correct answer/ alternative

1. Directive Principles of State Policy in India have been taken from the Constitution of–
   (i) Britain
   (ii) Germany
   (iii) France
   (iv) Ireland.
2. Who amongst the following was great advocate of 'Panchayati Raj System' ?
   (i) Pt. Jawahar Lal Nehru
   (ii) Mahatma Gandhi
   (iii) Sardar Patel
   (iv) Dr. B.R. Ambedkar
3. Directive Principles of State Policy strive to make India a
   (i) Welfare State
   (ii) Capitalist State
   (iii) Communist State
   (iv) Authoritarian State
4. In which of the following there is a provision for "equal pay for equal work" for both men and women ?
   (i) Fundamental Rights
   (ii) Preamble of the Constitution
   (iii) Directive Principles of State Policy
   (iv) Fundamental Duties

Notes

5. Which Article of the Constitution directs the State to establish Panchayati Raj Institutions in rural areas ?

   (i) Article 40

   (ii) Article 45

   (iii) Article 37

   (iv) Article 36.

## 20.4 DISTINCTION BETWEEN FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES OF STATE POLICY

Both Fundamental Rights and Directive Principles are essential features of the Indian Constitution. But there had been persistent conflict for a considerable period, between the two. Implementing Directive Principles of State Policy required imposing various restrictions on the Fundamental Rights. They have different and sometimes conflicting objectives and it was the main cause of conflict. Directive Principles of State Policy differ from Fundamental Rights in following respect;

(i) Fundamental Rights are justiciable but Directive Principles of State Policy are non-justiciable. It means that a person can appeal to the court of law if his/her Fundamental Rights are violated, but people cannot appeal to the court if the Government does not implement the Directive Principles.

(ii) Fundamental Rights are negative or prohibitive in nature because they put limitation on the State. On the contrary, Directive Principles are affirmative directions. They declare the duty of the State to achieve certain social and economic objectives.

(iii) Fundamental Rights establish liberal political democracy in India. However, Directive Principles make India a Welfare State.

(iv) Fundamental Rights protect the interests of the individual while Directive Principles of State Policy seek to promote socio-economic equality and particularly provide safeguards to weaker and vulnerable sections of the society.

## 20.5 RELATIONS BETWEEN DIRECTIVE PRINCIPLES AND FUNDAMENTAL RIGHTS

In the first three decades of working of the Constitution, there has been a long drawn debate that in case of conflict between the Fundamental Rights and Directive Principles, which of the two classes of the constitutional provisions should be accorded priority? Land Reforms, Nationalisation of Banks and many other such moves of the government were challenged in the court on the ground that they infringed upon the Fundamental Rights of the individual. The main bone

of contention was Article-31 Right to Property, which was acting as major hindrance in the process of implementing Directive Principles of State Policy. For some period, contradictory judgements of the Supreme Court and political compulsions of the ruling class deeply complicated this issue. In 'Golak Nath case', 1976, Supreme Court declared that, Fundamental Rights could not be amended by the parliament even for implementation of Directive Principles. It was contradictory to its own judgement in 'Shankari Parsad case'. In 'Keshvanand Bharti case' in 1973, the Supreme Court overruled its Golak Nath (1967) verdict and declared that Parliament can amend any part of the Constitution but it cannot alter its "Basic Structure". In 1978, by 44$^{th,}$ Constitutional Amendment, Right to Property (Article 31) was eliminated from the list of Fundamental Rights. Parliament, by this move removed the main hinderance from the path of implementing Directive Principles. Again in Minrva Mill case, 1980, Supreme Court reiterated that Parliament can amend any part of the Constitution but it cannot change the "Basic Structure" of the Constitution.

Although the Directive Principles and the Fundamental Rights appear in the Constitution as distinct entities, there may, nevertheless, be a conflict between them, particularly when laws are enacted to implement Directive Principles and such acts of the State impinge upon the Fundamental Rights of the individual.

But inspite of these differences there is a close relationship between the Fundamental Rights and Directive Principles of State Policy, They are complementary and supplementary to each other, both are required to realise the goals and ideals declared in the Preamble of the Constitution. Fundamental Rights form political democracy in India but to sustain this political democracy, implementation of Directive Principles is essential, as it will eventually lead to emergence of social and economic democracy or a Welfare State. Fundamental Rights have legal force behind them, however Directive Principles have sanction of the public opinion. They are fundamental in the governance of the country, no democratic government, therefore, can afford to ignore them.

## INTEXT QUESTIONS 20.3

**Write True or False against each of these statements:**

(i) Fundamental Rights are justiciable. (True/False)

(ii) People can appeal to the court if Directive Principles are not being implemented. (True/False)

(iii) Directive Principles aim at socio-economic justice. (True/False)

(iv) Right to Property is a Fundamental Right. (True/False)

(v) Parliament cannot alter the "Basic Structure" of the Constitution through constitutional amendment. (True/False)

Notes

## 20.6 IMPLEMENTATION OF THE DIRECTIVE PRINCIPLES OF STATE POLICY

Directive Principles are sometimes criticised for being non justiciable, vague and moral precepts, whose execution is totally left to the discretion of the government. But for more than sixty years of the working of the Constitution shows that successive governments in India have taken various steps to implement Directive Principles. Some of the measures in this effect are as follows–

(i) In order to give effect to the principle of Article-39, various legislations were enacted by the government with the objective to organise the ownership and control of material resources to serve the common good. Some of these are:

(a) Land Reforms – Land is most essential material resource in an agrarian country like India. Through land reforms zamidari system was abolished, ceiling on land holdings imposed and surplus land distributed among landless labourers.

(b) Minimum Wages Act, Income Tax and other Taxation measures to tax high income group and provide exemption and relief to the weaker sections.

(ii) Through 73rd Constitutional Amendment Act, 1992, government fulfilled constitutional obligation stated in Article-40. Three tier 'Panchayati Raj System' was introduced at the Village, Bloc and District level in almost all parts of the country.

**Figure 20.1:** Village Panchayat Meeting

(iii) To promote cottage industries (Article-43), government has established several Boards such as Village Industries Board, All India Handicraft Board, Silk Board, Coir Board, etc., which provide essential help to cottage industuries in finance and marketing.

(iv) Government has implemented provisions related to free and compulsory education (Article-45). Introduction of 86th Constitutional Amendment and subsequently passed the Rights to Education Act 2009, Elementary Education has been accepted as Fundamental Right of each child between the 6 to 14 years of age.

**Figure 20.2:** A picture of School going Children.

(v) Government has launched various development programmes, like Community Development Programme (1952), Integrated Rural Development Programme (1978-79) and in recent years Mahatma Gandhi Rural Employment Guarantee Act (MNREGA-2006) to raise the standard of living particularly in rural areas, as stated in the Article-47 of the Constitution.

(vi) Government has introduced various programmes to provide health and nutritional support to the women and children. i.e. maternity relief and mid-day meal to school children.

(viii) Central Government sponsored schemes like 'Pradhan Mantri Gram Swasthya Yojana' (PMGSY), 'National Rural Health Mission' (NRHM) and many other health and welfare related programmes are being implemented to fulfill the social sector responsibility of the Indian State. Directive Principles are no doubt the main guiding force behind all these welfare measures.

After studying the working of the Constitution and development strategy adopted by the government in India, we can definitely say that the Directive Principles have always been accorded due importance and priority in the legislation and policy making. Some of the Directives Principles have been implemented in word and spirit and some others are being deliberated. However, there are still wide

Notes

gaps in the fields of health and education in India as compared to developed and also many of the developing countries. India, as a Democratic Welfare State cannot turn a blind eye to it. So rapid modernisation and expansion of basic health and education demands immediate attention of the government. Constitution also contemplates right to work, right to adequate means of livelihood and socio-economic justice to all sections of society. So, the government is effectively doing much more in this direction to realise the ideals set by the founding fathers of our Constitution.

## INTEXT QUESTIONS 20.4

**Fill in the blanks**

(i) 73rd Constitutional Amendment introduced ..... Panchayati Raj system in rural areas. (two tier/three tier)

(ii) Right to Education Act was passed by Parliament in year ..... . (2006/2009).

(iii) Right to Education Act is applicable from the age ..... to ..... years. (0–6/6–14)

(iv) 86th Constitutional Amendment was adopted in the year ..... . (2009/2002)

## WHAT YOU HAVE LEARNT

Part IV of the Constitution of India (Article 36-51) contains Directive Principles of State Policy. These principles are in the form of instructions and guidelines to the government, aiming at socio-economic equality and establishing Welfare State in India. The State in India is expected to be guided by Directive Principles while making laws and framing policies to achieve greater collective good. These principles are non-justiciable or in other words they are not enforceable by the court of law but there is moral force and public opinions behind them.

On the basis of ideological source and objectives, Directive Principles can be classified into four categories;

1. Economic and Social Principles
2. Directives Based on Gandhian Principles
3. Directive Principles relating to International Peace
4. Miscellaneous Principles

The Directive Principles have been taken from Irish Constitution. These principles aim at establishment of socialistic pattern of society, which is one of the objectives declared in the Preamble of the Constitution and eventual emergence of India as a Welfare State.

Being a democratic Constitution Indian Constitution provides Fundamental Rights to all the citizens of the country. There are some basic difference between Fundamental Rights and Directive Principles of State Policy. Fundamental Rights put restrictions on the State authority, so they are negative and prohibitive on the other hand Directive Principles are positive and affirmative in nature. Directive Principles guide the State to act in a particular manner. Fundamental Rights are justiciable but Directive Principles are non-justiciable. Fundamental Rights represent liberal individualistic features of the Constitution while Directive Principles show the socialistic characteristic of the Constitution. Inspite of these differences, we can say that both fundamental Rights and Directive Principles of State Policy are essential features of our Constitution. It is a well recognised fact that for the sustainance of political democracy, estabilshed by fundamental Rights, socio economic equality and Welfare State is essential.

## TERMINAL QUESTIONS

1. Describe the Directive Principles of State Policy ? Are they justiciable?
2. Classifiy the Directive Principles of State Policy.
3. State any four Directive Principles aiming at socio-economic equality.
4. Describe Directive Principles based on Gandhian thought and principles.
5. Distinguish between Fundamental Rights and Directive Principles of State Policy.
6. "Successive governments in India accorded high priority to Directive Principles of State Policy" Do you agree with the statement ? Give suitable argument to support your answer.
7. What steps have been taken by the Government so far to implement Directive Principles of State Policy?
8. "In a poor country like India socio-economic justice should be given priority over the individual freedom" Do you agree with the statement? Justify your answer with suitable arguments.

Notes

## ANSWER TO INTEXT QUESTIONS

### 20.1

(i) Welfare

(ii) Non-justiciable

(iii) Mahatma Gandhi

(iv) Equitable

(v) Zamidari

### 20.2

1. (iv) Ireland
2. (ii) Mahatma Gandhi
3. (i) Welfare State
4. (iii) Directive Principles of State Policy
5. (i) Article 40

### 20.3

(i) True

(ii) False

(iii) True

(iv) False

(v) True.

### 20.4

(i) Three tier

(ii) 2009

(iii) 6 to 14

(iv) 2002

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# THE EXECUTIVE

India is a Democratic Republic. It is a Union of twenty eight States and seven Union Territories. Being a Union of States, it has two levels of governance. The Government at the Centre is called the Central or Union Government and the Government at the State level is called State Government. The Union Government has three organs – the Legislature (Parliament), the Executive. (The President, the Prime Minister, the Council of Ministers), and the Judiciary (Supreme Court). In this lesson, we shall study about the Executive part of the Government at the Centre as well as in the States.

## OBJECTIVES

After studying this lesson, you will be able to:

- understand the difference between the nominal and real Executive of the Union Government;
- describe the functions of the Executive;
- appreciate the position of the President of India;
- know about the legislative, executive and judicial powers and functions of the President;
- highlight the functions and powers of the Council of Ministers;
- explain the functions, powers and position of the Prime Minister;
- appreciate the role of the Governor as the Executive Head of the state; and
- understand the position, powers and functions of the Governor.

## 21.1 UNION EXECUTIVE

The Union Executive of Indian Government is composed of the President, the Prime Minister and his/her Council of Ministers. This part of the executive is temporary and political because it gets changed with the change in government after every general election. The second and permanent part of the executive

is the burcaucracy which is permanently appointed and work regularly and continuously upto a fixed age. The President is Head of both the parts of the executive under the provisions of Indian Constitution; the executive power is vested in the President of India. This power is exercised in him/her name through offices subordinate to his/her. The President stands at the Head of the Union Executive. All the executive actions are formally taken in his/her name. The President is also the Supreme Commander of the Defence Forces of India.

As you know that India is a Republic, hence the Head of State i.e. President is elected. The Constitution of India has laid down a procedure to elect the President.

### 21.1.1 Election of the President

The President is elected indirectly by an Electoral College which consists of the elected members of both the Houses of Parliament i.e. Lok Sabha and Rajya Sabha and also the elected members of all the State Legislatures (28 States), along with the legislatures of National Capital Territory of Delhi and Union Territory of Puducherry. Nominated members of Lok Sabha, Rajya Sabha as well as of Vidhan Sabhas are not entitled to vote for the election of the President. Certain qualifications have been specified in the Constitution of India for the post of President.

### 21.1.2 Qualifications

The qualifications required for the office of President are:

1. he/she is a citizen of India;
2. has completed the age of 35 years;
3. is qualified to be elected as a member of Lok Sabha and
4. should not hold any office of profit under the Union Government or any State Government. However, the office of the President, the Vice President, the Governor or the Ministers of Union or State is not considered as an office of profit.

### 21.1.3 Election Procedure

The election of the President is held in accordance with the system of proportional representation by means of single transferable vote. Voting at such election shall be by secret ballot. As far as possible there shall be uniformity in the scale of representation of the different States in the election of the President. For the purpose of securing such uniformity among the States as well as parity between the States as a whole and the Union, the number of votes which each elector casts in such election shall be determined by the following manner.

The value of vote of each elected member of Legislative Assembly of a State is

$$= \frac{\text{Total Population of the State}}{\text{Number of elected members of the State Legislative Assembly}} \times \frac{1}{1000}$$

For example the population of any State to be considered is 2,45,48,000 and the number of members elected is 120, then the value of vote of each member shall be

$$= \frac{2,45,48,000}{120} \times \frac{1}{1000} = 204.54 = 205 \text{ (Rounded off)}$$

The Population means the population ascertained at the last preceding cencus of which the relevant figures have been published. Similarly, to have parity between the votes of the elected members of Parliament on the one side and the elected members of the Legislative Assemblies of all the States on the other, a system, as given below, has been determined to calculate the value of vote of each Member of Parliament.

$$\text{Value of vote of each elected Member of Parliament} = \frac{\text{Total value of votes of Members of All the State Legislative Assemblies}}{\text{Total number of elected members of both the Houses of Parliament}}$$

$$\frac{844613}{776} = 1088.21 = 1088 \text{ (Rounded)}$$

For example, suppose the total value of votes of all the State Legislative Assemblies is 8,44,613 and the total number of elected members of Parliament is 776, then the value of vote of each Member of Parliament shall be:

Under the system of election, names of all the candidates are listed on the ballot paper and every voter has to mark his/her preference before the name of the candidate. Voters from the State Legislature Assemblies can cast their vote in their concerned State capital and the Members of Parliament can cast their votes in New Delhi or in their State Capital. Votes are counted in New Delhi and the election is managed by the Election Commission of India. First of all, the first preference votes of all the candidates are counted. The winning candidate must score more than 50% of the total valid votes polled. This amount of votes is called "Electoral Quota".

$$\text{Electroal Quota} = \frac{\text{Total number of valid votes polled}}{1+1=(2)} + 1$$

If no candidate is able to get the quota after the counting of first preference votes, then the second preference votes of the candidate getting the least number of first preference votes are transferred to other candidates and that particular candidate is eliminated. This system of transfer of preference votes is repeated till a candidate gets the required quota.

This system of counting is complicated and is adopted by the experts. Mostly, the result is final after the first counting of first preference votes. In the history of India, only once second preference votes were taken into account.

### 21.1.4 The Term of Office

Art 56 explains about the term of office of the President.

(i) The President shall hold office for a term of five years from the date on which he/she enters upon his/her office.

(ii) A person who holds, or who has held office as President, shall subject to other provisions of the Constitution be eligible for re-election to the office. Our first President Dr. Rajendra Prasad was elected for two full terms. No other President has been elected for the second term.

### 21.1.5 Removal of the President

Article 61 of the Constitution lays down the condition for the removal (impeachment) of the President. Although the office of President is of respect and dignity, yet he/she can be removed from his/her office for violation of the Constitution. The resolution to impeach can be moved in any one of the two Houses of the Parliament. This resolution should be moved by at least one fourth of the total members of the House and must be passed by not less than two-third majority of the total members of the House. After being passed in one House, the resolution goes to the second House for investigation.

The charges leveled against the President are investigated by the second House. President may defend him/her personally or through his counsel. If the second House also accepts the resolution by not less than the two third majority of the House, then the impeachment process succeeds and the President stands removed from his/her office on the date when it is passed in the second House. Such a resolution has to be passed by both the Houses. This process of removal of the President is called Impeachment.

### 21.1.6 Vacancy in the Office of President

Vacancy in the office of President may be caused either due to death or resignation or impeachment. In such a condition, the Vice President of India

automatically officiates as President. Election for the President is to be held within six months of the vacancy as the Vice President cannot officiate for more than six months. The President may resign by tendering his/her resignation which is addressed to the Vice President. Resignation of the President is communicated by the Vice President to the Speaker of the Lok Sabha.

## INTEXT QUESTIONS 21.1

1. State the composition of the Electoral College for the election of the President of India.
2. Who is called Head of the Union Executive?
3. Mention the qualifications required for the post of President of India.
4. How is the value of vote for each Member of Legislative Assembly is calculated for the election of the President of India?
5. How is the value of vote of each Member of Parliament is calculated for the election of the President of India?
6. What is meant by eletoral quota and how is it calculated for the election of President of India?
7. Name the procedure for the removal of the President of India from his/her office.
8. Mention the situations under which the post of the President falls vacant?
9. Who officiates in the absence of the President?

## 21.2 POWERS OF THE PRESIDENT

As you know that President is Head of State and also Head of the Union Executive. He/She is the first citizen of India and the Supreme Commander of the defence forces of India. The powers, vested in the office of President, are actually exercised by the Union Council of Ministers in his/her name. Article 74 of the Constitution says that there shall be a Council of Ministers with the Prime Minister at the head to aid and advice the President who shall in the exercise of his functions acts in accordance with such advice. In accordance with the 44$^{th}$ Amendment, the President may ask the Council of Minister to reconsider such advice, but the President shall be bound to act in accordance with the advice tendered after reconsideration. Hence, the President is the nominal executive head whereas real head of executive is the Prime Minister, who is at head of Council of Ministers. It has rightly been said by Dr. B.R. Ambedkar that the President occupies the same position as the king in the British Constitution.

The powers of the President may be classified as:

### A. Executive Powers

As per Article 53; the executive power of the Union shall be vested in the President and shall be exercised by him/her either directly or through officers subordinate to him/her in accordance with the Constitution. The President appoints the Prime Minister and other ministers on the advice of the Prime Minister. This appointment made by the President is the most important one as the Prime Minister alongwith the Council of Ministers, in the real sense, uses all the powers of the President.

The President appoints the Chief Justice and other judges of the Supreme Court and High Courts. For all such appointments, the Chief Justice of Supreme Court is consulted. But at present, in accordance with the 1993 decision of the Supreme Court as reinterpreted in 1999, the President is bound by the recommendations of a panel of senior most judges of the Supreme Court for all the judicial appointments. This panel of senior judges is called the 'Collegium of the Supreme Court'. The President also appoints the Attorney General, the Comptroller and Auditor General of India (CAG); The Chief Election Commissioner and other Election Commissioners, the Chairman and other members of the Union Public Service Commission; Governors of all States, Lt. Governors of Union territories, India's Ambassadors and High Commissioners in other countries. He/she also appoints the Chief of Army, Navy and Air Force. So, the President has the power to make most of the important appointments. All diplomatic work, international treaties and agreements are executed in his/her name.

### B. Legislative powers

The President is an integral part of the Parliament and enjoys many legislative powers. The President may summon the Parliament at least twice a year with a gap of not more than six months between two consecutive sessions. The President addresses both Houses of Parliament jointly at the first session after every general election and also at the commencement of the first session every year. The President can dissolve the Lok Sabha on the recommendation of the Prime Minister. The President has the power to nominate twelve members to the Rajya Sabha and two members of Anglo-Indian Community in the Lok Sabha. Every bill passed by the Parliament is sent to President for his/her assent to become a law. Without his/her assent, no bill can become a law. The President can issue an 'Ordinance' when the Parliament is not in session. This 'Ordinance' has the force of law and needs to be approved by both the Houses within six weeks after the commencement of the session, otherwise it gets lapsed automatically.

## C. Financial Powers

The President is the custodian of Contingency Fund of India. This fund is kept by Union Government to meet any unforeseen expenditure. The President has full control over this fund. All money Bills are introduced in the Lok Sabha with the prior approval of the President. Annual budget and Railway budget are introduced only after the recommendation of the President. The President appoints the Financial Commission after every five years. The reports of the Controller and Auditor General of India (CAG) is placed before the President for necessary action.

## D. Judicial Powers

The President of India appoints the Chief Justice and other judges of the Supreme Court and High Courts. The President is entitled to certain privileges and immunities. He/She is not answerable to any Court of Law for the exercise of his/her functions. During his/her tenure, no criminal proceeding can be initiated against him/her in any court of law. He/she can neither be arrested nor asked to be present in any Court of Law. Even for a civil case, a prior notice of two months is required.

The President can pardon a criminal, reduce the punishment or suspend, commute or remit the sentence of a criminal convicted by any High Court or the Supreme Court. He/She can even pardon a person convicted by Court Martial. His/Her power of pardon includes pardoning of a person with capital punishment. But the President exercises this power on the advice and the report of Home Ministry.

## E. Emergency Powers

There are certain emergency provisions in the Constitution of India which give power to the President to proclaim emergency, if some kind of extraordinary situation arises in which normal functioning of the Constitution is not possible. Constitution has provisions under Artcile 352, 356 and 360 to deal with such abnormal and extraordinary situations which are also termed as emergency powers. The Constitution makers had envisaged three types of extraordinary situations. Firstly, when the security is threatened by war or external aggression or armed rebellion. Secondly, when it becomes difficult or not possible for the Government of a State to work or function in accordance with the Constitution or breaking down of constitutional machinery in a State or imposition of President's Rule and thirdly, when the financial stability of the country is threatened. Let us discuss these provisions and powers of the President under different heads.

## 1. Proclamation of National Emergency (Article 352)

Under Article 352, the President is empowered to declare and impose emergency if the Union Cabinet consisting of Prime Minister and other ministers of Cabinet rank recommend in writing that such a proclamation may be issued. Only after getting the written communication, the President may impose emergency which can be recommended by the Cabinet on the basis of threat to the security of the country due to war, external aggression or internal armed rebellion. Declaration of National Emergency is put before the Parliament within a month of the proclamation for its approval. A proclamation so approved shall cease to operate after six months unless approved for the second time before the period of six months. The resolution needs to be passed by either House of Parliament only by a majority of the total membership of that House and by a majority of not less than two-third of the members of that House present and voting. This type of emergency has been declared in our country three times. First, it was declared on 26$^{th}$ October, 1962 when China had attacked our borders. For the second time it was declared on 3$^{rd}$ December, 1971 when Pakistan had attacked and for the third time on 25$^{th}$ of June 1975 due to internal disturbance. With the declaration of such emergency (National Emergency), the rights of the individuals and the autonomy of the States are affected. The federal character of the Constitution becomes Unitary and the authority and power of the Union Government increases and it can make laws on such subjects which are included in the State List. Secondly, the President of India can issue necessary directions to the States.

During the period of emergency, the President of India can modify the provisions regarding the distribution of revenue between the Centre and the States. Due to declaration of emergency on the basis of war or external aggression, the Fundament Rights or freedoms under Article 19 also get suspended and the Parliament can extend its tenure by one year at a time. So, it shows that the declaration of emergency by the President of India has various effects and adds to the powers of the President.

## 2. President's Rule in the State (Article 356)

Under Article 356, the President of India is empowered to impose emergency in any State on receipt of a report from the Governor of the concerned State that a situation has arisen under which the Government of that particular State cannot be carried on as per the Constitution or break down of the constitutional machinery in the State. It is also called imposition of President Rule in the State. This emergency is also to be approved by both the Houses of Parliament within two months otherwise it shall cease to operate. It remains valid for six months and can be extended by another six months by the reviewed approval of the Parliament.

Under such emergency, the President can assume to himself/herself all or any of the functions of the State Government or he/she may vest all or any of the functions with the Governor or any other executive authority. The President may dissolve or suspend the State Legislative Assembly. He also can authorise the Parliament to make laws for the concerned State or States.

### 3. Financial Emergency (Article 360)

Third type of emergency can be declared by the President under Article 360, if the President is satisfied that the financial stability of the country or any of its part is in danger. This type of emergency also needs to be approved by both the Houses of Parliament within two months of its declaration.

Under this emergency, the President may ask the States to reduce the salaries and allowances of its employees, may reserve all the money bills of the State for the consideration of Parliament, may give directions for the reduction of salaries and allowances of the judges of High Courts and the Supreme Court. It is the President who can make such proclamation under the Constitution of India but only on the written recommendation of the Council of Ministers. As President is the Head of Union Executive, so is the Governor as Head of the State Executive. Position of the Governor in State Government is similar to that of the President in the Union Government. Governor is the Head of the State Executive. All the bills passed by the State Legislative Assembly become law only after the assent of the Governor.

## INTEXT QUESTIONS 21.2

1. Mention any three executive powers of the President of India.
2. List any three legislative powers of the President of India.
3. What is meant by the 'Collegium of Supreme Court'.
4. Fill in the blanks
   (i) National emergency is proclaimed under Article …… .
   (ii) President's Rule can be imposed on any State under Article …… .
   (iii) Financial Emergency can be proclaimed by ……. of India under Article …… .
   (iv) Resignation of the President of India should be addressed to …… .
   (v) ……. of India automatically officiates as President in the event of the vacancy.

## 21.3 THE VICE-PRESIDENT

The Vice-President is elected by the members of Lok Sabha and Rajya Sabha in accordance with the system of proportional representation by means of the single transferable vote and the voting shall be by sceret ballot. Certain qualification have been specified for the office of Vice-President. A citizen of India who has completed 35 years of age can be a candidate for the office provided he/she does not hold any office of profit.

Vice President holds the office for a term of 5 years. He/she may resign and leave the office even before completing his/her term or can be removed from his/her office even before completion of 5 years if a resolution to this effect is passed by a majority of members of Rajya Sabha and Lok Sabha separately.

### 21.3.1 Functions and Powers of the Vice President

The Vice President is the ex-officio Chairman of the Rajya Sabha and his/her functions as Chairman are similar to those of Speaker in the Lok Sabha. He/She maintains the order of the house, gives time to the members to speak or ask the questions. In case of a tie he/she can cast his/her vote to reach a decision.

In Case of vacancy in the office of President, the Vice President automatically officiates as President for not more than six months. During this period he/she enjoys all the powers of the President. He/she also discharges all the functions of the President if called upon to do the same in case the President is unable to discharge his/her duties due to some temporary reason.

### ACTIVITY 21.1

Make a list of all the Vice Presidents of India in a chronological order.

### INTEXT QUESTIONS 21.3

1. How can a Vice-President be removed from his/her office?
2. What is the term of office of Vice-President.
3. Describe any two functions of the Vice-President.

## 21.4 PRIME MINISTER AND THE COUNCIL OF MINISTER

As discussed earlier the temporary or political part of the executive comprises of Prime Minister and the Council of Minister. The executive powers of the President are actually exercised by the Council of Ministers with Prime Minister. The President is the constitutional head of the State and nominal head of Government but the Prime Minister and his/her Council of Minister is the real head of the Government. As per Constitution of India, the Prime Minister is appointed by the President of India but the person such appointed must have the majority support of the Lok Sabha.

### 21.4.1 Appointment of the Prime Minister

After the general elections, if any one political party gets a clear majority (more than half of the total elected members) then the President invites the leader of a political party to form the government and appoints him/her as Prime Minister. If the leader of party is not an elected member of the Parliament, then he/she will have to be an elected member of Parliament (Lok Sabha or Rajya Sabha) within six months of his/her appointment. It is possible that no single party is able to get majority, then the President may invite a person who is likely to win the support of majority of members of the Lok Sabha. Once appointed the Prime Minister holds the office so long he/she enjoys the support of the majority of members in Lok Sabha. Usually the Prime Minister is the elected member and leader of the majority party in Lok Sabha; but it is not mandatory. The Prime Minister may not be a member of Lok Sabha and still may hold the office. It has happened in the previous years. Mrs. Indira Gandhi was not a member of Lok Sabha in 1966 when appointed as Prime Minister. Even Dr. I K Gujral was a member of Rajya Sabha and not of Lok Sabha in 1997. Our present Prime Minister Dr. Manmohan Singh is also not a member of Lok Sabha and belongs to Rajya Sabha. Hence, it is very clear that Prime Minister should be an elected member of either of the two houses.

Members of the Council of Ministers are appointed by the President on the advice of the Prime Minister. Prime Minister is free to choose any one to be the members of the Council of Minister. He/She allots the portfolios to the ministers and can change their portfolios as and when desired. If the person appointed, and is not a member of Parliament, then he/she will have to get himself/herself elected from either house of Parliament within six months of his/her appointment.

At present there are three categories of Minister i.e. Cabinet Ministers, Ministers of State with Independent charges and Ministers of State. Cabinet Ministers are usually more important and attend the meetings of the Cabinet. Minister of States

are next to the Cabinet Ministers but assist the Cabinet Ministers. There are some Minister of States with independent charge. All the Ministers are collectively as well as individually responsible and answerable to Lok Sabha.

### 21.4.2 Power and Functions of the Prime Minister

Prime Minister of India is the real head of executive and government. His/her position is very important and is the Chief Advisor to the President of India. Prime Minister constitutes the Council of Minister and the Ministers hold the office as long as they enjoy the confidence of the Prime Minister. The Prime Minister is head of the Council of Minister and can change the portfolio of any Minister or can recommend the removal of any Minister from his/her office as and when he/she desires.

The Prime Minister presides over the meetings of the Cabinet and Council of Ministers and conducts its proceedings. He/she is also the Chief spokesperson of the Government. He/she is responsible for the policies of the government. He/she is the architect of the foreign policy. All international agreements and treaties are made with the consent of the Prime Minister. Prime Minister is the link between the President and the Cabinet. He/she keeps the President informed about all the decisions and policies of the government/negotiations made at the international forums. He/she is the leader of the ruling party.

### 21.4.3 The Council of Ministers and the Cabinet

The Council of Minister comprises of all the ministers of all the categories but the Cabinet consists of only the Cabinet rank Ministers. Cabinet meetings are held regularly to take various decisions but it is rare to see a meeting of Council of Ministers. Normally, the policies and programmes of the government are decided in the Cabinet and not in the Council of Minister. A Constitutional Amendment has fixed a limit that the maximum number of Minister be appointed should not be more than 15 per cent of the total strength of Lok Sabha.

### 21.4.4 Powers and functions of the Cabinet and Council of Ministers

All the executive powers of the President are exercised by the Cabinet/Council of Ministers with Prime Minister. It prepares all the internal and external policies. The Cabinet/Council of Ministers prepares agenda for the session of the Parliament. It prepares the text of the Presidential address. The Cabinet/Council of Ministers is responsible for the issuance of Ordinance at the time when parliament is not in session. Even the sessions of the Parliament are convened as per the advice of the Cabinet/Council of Ministers.

## INTEXT QUESTIONS 21.4

**(A) Fill in the Blanks**

1. Prime Minister is the _____ head of the Government.
2. The Meetings of the Council of Ministers presided over by _____ .
3. Prime Minister is link between _____ and _____ .
4. President appoints the minister on the _____ of _____ .

**(B) Answer the following questions**

1. Who is the head of the Council of Ministers?
2. Mention any two categories of Ministers.

## 21.5. EXECUTIVE IN THE STATES

### 21.5.1 Governor

According to the Constitution of India the President appoints a Governor for each State. Two or more States may have one Governor. Let us study the qualifications, powers, functions and position of the Governor, as the head of State Executive.

### (A) Qualifications for Appointment

The Governor of a State is appoined by the President of India. To be eligible for appointment as Governor, a person must have the following qualifications as per Article 157–158.

(i) He/she must be a citizen of India.

(ii) He/she must have completed the age of 35 years.

(iii) He/she should not hold any office of Profit.

### (B) Term of office of the Governor

As per Article 156:

(i) Governor shall hold the office during the pleasure of the President.

(ii) The Governor may resign his/her office; otherwise the Governor shall hold office for a period of 5 years from the date on which the he/she enteres upon his/her office.

### (C) Powers of the Governor

The Governor has executive, legislative, financial, judicial and some other important miscellaneous powers.

### (i) Executive Powers

The Governor is the head of the State Executive. All the executive functions in the state are carried on in the name of Governor. He/she makes various important appointments. The Governor appoints the Chief Minister of the State. He/She also appoints other ministers on the recommendation of the Chief Minister. The Advocate General of the state, Chairman and members of the State Public Service Commission are appointed by the Governor. The Governor discharges all these functions on the aid and advice of the Council of Ministers headed by Chief Minister.

### (ii) Legislative Powers

The Governor is the part and parcel of the State Legislature. He/she can summon and prorogue the State Legislature. He/she can dissolve the Legislative Assembly on the recommendation of the Chief Minister. He/she can address the session of the state Legislative Assembly or the joint session of both the houses if they exist in any state. The Governor is empowered to nominate one sixth members of the total strength of Legislative Council, if it exists in any State.

Any resolution passed by the Legislative Assembly becomes a law only after getting the assent of the Governor. He/she has the power to issue the ordinances when the Assembly is not in session and these ordinances have the weightage of a Law.

### (iii) Financial Power

(I) No money bill can be introduced in the Assembly without the prior permission of the Governor.

(II) The annual budget or the supplementary budget is introduced in the name of the Governor.

(III) The Governor has the control over the State contingency fund.

### (iv) Miscellaneous Powers

The Governor has the power to grant pardon, reprieves, remission of punishment or to suspend, remit or commute a matter to which the executive power of the state extends. The Governor of a State acts as head of the state as well as representative of the Union Government and enjoys certain Discretionary Powers.

(a) If at some point of time Governor feels that the State Government is not working or is not able to work as per the Constitution of India, then he/she may send a report to President of India for imposition of President's rule.

(b) If no party gets majority in Legislative Assembly the Governor can use his discretion to appoint the Chief Minister.

(c) In certain circumstances Governor may reserve a bill for the consideration of President.

These powers of Governor were meant to deal with extraordinary situations.

### 21.5.2 The Chief Minister

Each State has a Council of Minister to aid and advise the Governor in the exercise of his/her functions. Chief Minister is the real head of the government in the State. The Council of Ministers with the Chief Minister as its head exercises real authority at the State level.

The Chief Minister is appointed by the Governor. The person who commands the majority support in the State Legislative Assembly (Vidhan Sabha) is appointed as the Chief Minister by the Governor. The other ministers are appointed by the Governor on the advise of the Chief Minister. The Ministers included in the Council of Ministers must belong to either. House of the State Legislature. A person who is not a member of the state legislature may be appointed a Minister, but he/she ceases to hold office if he/she is not elected to the State Legislature within six months of his/her appointment. The portfolios to the members of the Council of Minister are allocated by the Governor on the advice of the Chief Minister.

#### Powers and Functions of the Chief Minister

The Chief Minister is the head of the Council of Minister of his/her State. The constitutional position of the Chief Minister is more or less similar to that of the Prime Minister. The Chief Minister plays an important role in the administration of the State.

The power and functions of the Chief Minister are:

(a) Chief Minister is the real head of the State Government. Ministers are appointed by the Governor on the advise of the chief Minister. Portfolios to the Ministers are allocated by the Governor on the advice of the Chief Minister.

(b) Chief Minister presides over the Council of Ministers/Cabinet meeting. He/she coordinates the functioning of different Ministers. He/she guides the functioning of the Cabinet/Council of Ministers.

(c) Chief Minister plays a key role in framing laws and policies of the State Government. Bills are introduced in the State Legislature with his/her

approval. He/she is the Chief spokesman of the policies of his/her government both inside and outside the State Legislature.

(d) The Constitution provides that the Chief Minister shall communicate to the Governor about all decisions of the Council of Ministers/Cabinet relating to the administration and affairs of the State and proposals for legislation.

(e) If the Governor so requires, the Chief Minister submits for consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered or approved by the Cabinet.

(f) The Chief Minister is the sole link of communication between the Cabinet and the Governor. The Governor has the right to be informed by the Chief Minister about the decisions taken by the Cabinet/Council of Ministers.

Thus, it is clear that the real authority is vested with the Council of Ministers headed by the Chief Minister. The real executive of the State is the Council of Ministers/Cabinet headed by the Chief Minister.

## INTEXT QUESTIONS 21.5

**Fill in the blanks**

1. Governor of a State is appointed by the …… .
2. A Governor holds office for a period of ……. Years from the date on which he/she enter his/her office.
3. A Governor can be removed from his office by ……. before ……. of his tenure.
4. The Chief Minister is ……. head of the Sate Government.
5. The Chief Minister is appointed by the ……. .

## WHAT YOU HAVE LEARNT

The Union Government has three organs – the legislature, the executive and the judiciary. The executive is divided in two parts. Temporary executive (Comprising of President, Council of Minister) and permanent executive (Comprising of Government officers and officials). The President of India is the Head of executive and also the Head of the State. All the executive powers of the President are exercised by the Council of Ministers with Prime Minister at the head. The President of India is elected by an electoral college comprising of all the elected members of Parliament, all the elected members of Legislative

Assemblies of all the States and the Union Territories of Delhi and Puduchery. The election of the President is held in accordance with the system of proportional respresentation by means of single transferable vote system by secret ballot. The term of office of President is 5 years. The President of India can be removed from office by the process of impeachment. Vacancy in the office of President may be caused due to death or resignation or removal by impeachment. The President of India has legislative, executive as well as judicial powers. He/she makes most of the important appointments such as Chairman and members of UPSC; Attorney General of India, Comptroller and Auditor General of India, Chief Election Commissioner and other Election Commissioners. He/she is a part of Parliament and may summon and prorogue the Parliament. He/She addresses First Session of both the houses jointly every year. The President is the custodian of the Contingency Fund of India. All money bills and budget are introduced in the Parliament with his prior approval. He/She is not answerable to any Court of Law for the exercise of his/her power. The President can pardon a criminal, reduce the punishment of any one convicted. The President of India also has vast emergency powers.

Constitution of India also provides provision for the office of Vice President. The Vice President is the ex-officio Chairman of the Rajya Sabha and is responsible for the smooth functioning and order of the house. In case of vacancy in the office of President he/she acts as President till the elections are held for the President which are held within six months of such a vacancy.

Prime Minister and the Council of Ministers exercise the executive powers of President. Prime Minister is the Chief advisor of the President. He/she is a link between the President and the Parliament. The Prime Minister of India is the real head of executive and the government. His/her appointment is made by the President and he/she is the leader of the majority party or the coalition. The Prime Minister is the Chief spokesperson of the Government and also chief architect of the policies and programmes of the government. Prime Minister can appoint the Ministers, alter their portfolios, and/or can change the Ministers. The Prime Minister keeps the President informed about all the decisions of the Council of Ministers and also about the important happenings in government/ state.

Council of Ministers comprises of three categories of Ministers i.e. Cabinet Ministers, Ministers of State with Independent Charge and Ministers of State. Cabinet Ministers are generally senior leaders of the majority party. Decisions of the Council of Ministers are mostly taken by the Cabinet.

The Governor is the constitutional head of the State. The real executive of the state is the council of the Ministers/Cabinet headed by the Chief Minister.

## TERMINAL QUESTIONS

1. State the qualifications required for the office of the President of India.
2. How is the President of India elected? Explain the manner of his/her election.
3. Describe the executive powers of the President.
4. Explain the legislative and financial powers of the President of India.
5. Critically examine the position of the President of India as Head of the State and Head of the executive.
6. Discuss the role of Governor as the Executive Head of the State.
7. Describe the relationship of the Governor with the Chief Minister of the State.

## ANSWER TO INTEXT QUESTIONS

### 21.1

1. All the elected members of Lok Sabha, Rajya Sabha and the State Legislative Assemblies.
2. The President of India. $\frac{\text{Total number of votes polled}}{1+1=(2)}+1$
3. Should be a citizen of India; not less than 35 years of age; should be eligible to contest the Lok Sabha election; should not hold any office of profit.
4. Value of M.L.A's vote $= \frac{\text{Total Population of the State}}{\text{Total member of elected MLAs}} \times \frac{1}{1000}$
5. Value of vote of each elected member of parliament

$$= \frac{\text{Total value of all the elected MLAs of all the State Assemblies}}{\text{Total elected members of Parliament}}$$

6. Electoral Quota =
7. Impeachment.
8. Resignation, death or removal through impeachment.
9. Vice President.

### 21.2

1. (i) Appointment of Prime Minister,Governors, Chief Justice of Supreme Court

(ii) As Supreme Commander of the Armed forces declares war and make peace.

(iii) All laws are enacted by the Union Parliament are enforced in his/her name.

2. (i) President summons and prorogues the Houses of Parliament.

(ii) He/she nominats twelve member of Rajya Sabha.

(iii) The President can call a joint sitting of the two Houses of Parliament in case of disagreement.

3. The power of appointment of judges has been passed on to a group of Supeme Court judges which is called 'Collegium' of the Supreme Court.

4. (i) 352; (ii) 356; (iii) The President, 360; (iv) Vice President; (v) Vice President

## 21.3

1. Through a resolution passed by a majority of members of Rajya Sabha and Lok Sabha separately.
2. 5 years
3. (i) He/she is the ex-officio chariman of the Rajya Sabha.

(ii) He/she officiates as President in case of Vacancy.

## 21.4

**A.** 1. Real

2. Prime Minister

3. Council of Ministers and President

4. advice of Prime Minister

**B.** 1. Prime Minister

2. (i) Cabinet Rank Minister

(ii) Ministers of the State

## 21.5

1. President
2. Five
3. President, expiry
4. Real
5. Governor

Notes

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22

# THE LEGISLATURE

You have read in the preceding lesson about the Union Executives and the State Executives which are responsible to their respective legislatures ie the Union Parliament and the State Legislatures respectively. The Union Parliament consists of the President and the two Houses of the Parliament namely the Lok Sabha and the Rajya Sabha. Lok Sabha which is also called the lower house is the popular house whose members are directly elected by the people. Rajya Sabha is the upper house which represents the States of the Indian Union whose members are elected by the elected members of the Legislative Assemblies and the Union Territories. President of India is also an integral part of the Indian Parliament although he/she is not a member of either House. Similarly, Governor is an integral part of the State Legislature. The State legislatures are bicameral/unicameral where the Lower House is called Vidhan Sabha or Legislative Assembly and the Upper House is called Vidhan Parishad or Legislative Council . In this lesson, we will study about these legislative bodies at the Centre as well as in the States.

## OBJECTIVES

After studying this lesson, you will be able to:

- recall that the President of India is an integral part of the Indian Parliament;
- describe the composition of the Union as well as the State Legislatures;
- explain the powers and functions of the Indian Parliament and the State Legislatures;
- highlight that the Lok Sabha is more powerful than Rajya Sabha;
- distinguish between an ordinary bill and a money bill;
- explain the law making procedure in Indian Parliament; and
- compare the powers and functions of the Parliament to those of the State Legislatures.

## 22.1 COMPOSITION OF PARLIAMENT

The Indian Parliament consists of the President of India and two Houses namely the Lok Sabha (House of the People) and the Rajya Sabha (Council of States). Lok Sabha is directly elected by the people and Rajya Sabha is indirectly elected.

**Figure 22.1:** Parliament of India

### 22.1.1 Rajya Sabha : Membership and Election

The Constituent Assembly of India was unanimous about the necessity of Rajya Sabha to safeguard the rights and priveleges of the States keeping in mind the principle of federalism. The Rajya Sabha consists of not more than 250 members. Out of them, 12 members are nominated by the President on the basis of their excellence in the field of literature, science, art, social service and sports. The rest are elected by the elected members of the State Assemblies on the basis of proportional representation through Single Transferable Vote System. Unlike the American Senate which has two members each from 50 States, Indian Council of States ie Rajya Sabha does not have equal representation. Rather the number of members from different States is proportional to the population of the States.

### 22.1.2 Qualifications, Tenure, Salaries and Allowances

- The qualifications for becoming a member of Rajya Sabha member are given below. He/she:
  1. should be a citizen of India;
  2. should not be less than 30 years of age;
  3. should possess such other qualifications as are determined by the Parliament from time to time; and

Notes

4. should not be of unsound mind, insolvent or holding an office of profit under the Union or the State government.

### 21.1.3 Tenure

Rajya Sabha is a permanent House which never gets dissolved. Its members are elected for six years. One third of its members retire every two years. They are entitled to contest again for the membership. But, a member elected against a mid-term vacancy serves for the remaining period only. This system of election ensures continuity in the working of Rajya Sabha.

### 21.1.4 Salaries and allowances

Every member of the Rajya Sabha gets a monthly salary as well as a constituency allowance. In addition, they get many other benefits like free accommodation, water, electricity, telephone and travel facilities. On retirement, the members of Rajya Sabha are entitled to a monthly pension also.

### 22.1.5 Officials of Rajya Sabha

The Vice-President of India is the ex-officio Chairman of Rajya Sabha. The House also elects a Deputy Chairman from amongst its members. As the Vice-President is not a member of Rajya Sabha, he/she is normally not entitled to vote except in case of a tie. The functions of the Chairman are almost the same as those of the Speaker of Lok Sabha.

## INTEXT QUESTIONS 22.1

Answer the following questions:

(i) Why is Rajya Sabha called a permanent house?

(ii) What is the basic difference between the American Senate and Rajya Sabha?

(iii) Who elects the members of Rajya Sabha?

### 22.1.6 Lok Sabha: Membership and Election

Lok Sabha (House of the People) which is also called the Lower House shall not consist of more than 550 members. Out of these, not more than 530 can be elected from the States and not more than 20 from the Union Territories. The present strength of Lok Sabha is 543. In case the Anglo-Indian community is not adequately represented, the President of India can nominate two Anglo-Indian members to Lok Sabha. A number of seats in Lok Sabha are reserved for the Scheduled Castes and Scheduled Tribes. The contestants from these constituencies must be SCs/STs but voters have joint electorate which means

all the eligible voters, irrespective of caste, creed or cummunity participate in the election.

The election to the Lower House i.e. Lok Sabha is conducted on the basis of Universal Adult Franchise. For this, the voting age has been fixed at 18 years and above. The election is held through secret ballot with the help of Electronic Voting Machine (EVM) based on simple majority which means that the highest vote getter is declared elected.

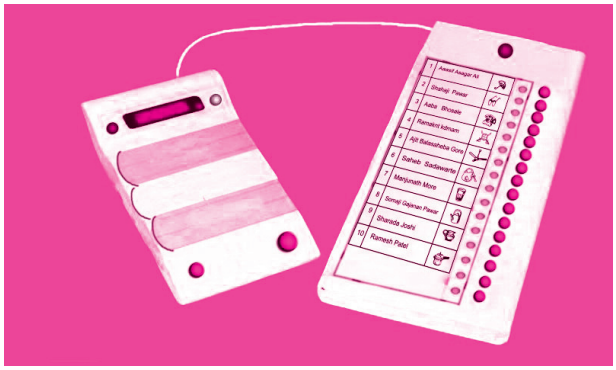


**Figure 22.2:** Electronic Voting Machine

### 22.1.7 Qualification, Tenure and allowances

#### • Qualifications

In order to become a member of Lok Sabha, a person should be:

1. a citizen of India having attained the age of 25 years;
2. registered as a voter in any constituency in India;
3. from SC/ST category, if contesting from a reserved constituency; and
4. possessing such other qualifications as may be laid down by the Parliament by law.

### 22.1.8 Tenure

The tenure of Lok Sabha is five years unless dissolved earlier by the President of India. During emergency, its tenure can be extended by one year at a time, but it will not exceed six months after emergency is over.

### 22.1.9 Officials of Lok Sabha

The Presiding Officer of Lok Sabha is known as Speaker. There is a provision for Deputy Speaker also. Both of them are elected by the members of Lok Sabha from amongst themselves. The Speaker and the Deputy Speaker can be removed from their office if the House passes a resolution to this effect. The speaker has no vote, except is case of tie.

Powers and functions of the Speaker and the Deputy Speaker of Lok Sabha as well that of the Chairman and Deputy Chairman of Rajya Sabha are identical. Some of them are being given below:'

(i) To preside over the meetings of the House, maintain discipline and decorum, give permission to speak and fix time for the speeches.

(ii) No resolutions, motions, reports or bills can be introduced in the House without speaker's permission.

(iii) If any member misbehaves, he/she can give a warming or ask the member to withdraw from the House.

(iv) To adjourn the House in case of disorder or indiscipline or lack of quorum.

(v) The speaker of Lok Sabha is the sole authority to decide whether a particular bill is Money Bill or not.

(vi) To protect the rights of the members against all encroachments and safeguard their immunities.

(vii) Whenever, there is a joint session of both the Houses of Parliament, it is the Lok Sabha Speaker who presides over this joint session.

(viii) To regulate the entry of the visitors in the House.

## INTEXT QUESTIONS 22.2

Answer the following questions:

(a) In case of inadequate representation, in Lok Sabha, members of which community are nominated by the President of India?

(b) Who presides over the joint-session of the Parliament?

(c) Name any three States of India having minimum number of members in Lok Sabha.

(d) Who conducts the proceedings of Lok Sabha in the absence of the Speaker?

## 22.2 POWERS AND FUNCTIONS OF PARLIAMENT

The Indian Parliament performs executive, financial, electoral and various other functions. Let us study how these functions are performed.

### A. Legislative Powers and Functions

The main function of the Parliament is to make laws for the whole country related to subjects mentioned in the Union List, the Concurrent List and under

special circumstances, on the subjects of the State List also. The Parliament has inclusive rights to make laws on the 97 Subjects listed under the Union list. It is also empowered to make laws on the 47 Subjects of the Concurrent List along with the State Legislatures. In case, both the Parliament and the State Legislature make laws on the same subject of the Concurrent List, the Central law prevails upon the law made by the State, in case there is a clash between the two. The subjects which do not find any mention in all the three lists are called residuary subjects. Only the Parliament is empowered to make laws on them.

All the bills which are introduced in the Parliament have to be passed by both the Houses before sending the same to the President of India for his/her consent. After the consent, every bill becomes a law. The passage of this bill from its introduction to becoming a law has been explained later in this chapter.

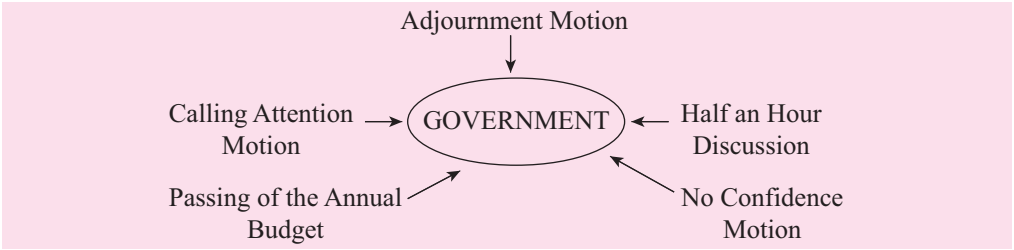
## B. Executive Powers and Functions

In a Parliamentary system, the executive which runs the administration must enjoy the confidence of the Parliament, especially in the Lok Sabha which represents the people. The Prime Minister and the Council of Ministers individually as well as collectively are responsible to the Parliament. The Parliament maintains its control over the Executive and ensures that the Executive does not overstep its jurisdiction and remains responsible to the Parliament. Some of the ways to keep a check on a minister or the Council of Ministers are as follows:

(i) The first hour of every working day in both the Houses is used for asking questions and supplementary questions. This enables the members to seek information about matters related to any issue. The minister concerned has to answer the questions which are sent in advance. This fixed hour is called Question Hour.

(ii) Parliament provides ample opportunities to the members to discuss any matter before the House. This gives an opportunity to the opposition members to criticise the government and members of the ruling party to support if something happens when a bill is passed.

(iii) The Parliament also exercises control over the ministers holding charge of different departments through various motions:



(a) **Adjournment Motion:** Any member of the Parliament may move the adjournment motion for discussion on an important and urgent issue. A full debate is allowed on the issue if the Speaker in Lok Sabha or Chairman of Rajya Sabha admits it.

(b) **Calling Attention Motion:** Whenever, there arises an important issue of urgent nature related to public importance, Calling Attention Motion is moved in the House to draw the attention of the Government.

(c) **Half an Hour Discussion:** It provides another opportunity to the members to express their views on a particular topic to corner the government.

(d) **Passing of the Annual Budget:** It involves discussion where the opposition gets best opportunity to criticise the government as a whole. The disapproval of the budget is considered as an expression of lack of confidence.

(e) **No Confidence Motion:** This motion can be used by Lok Sabha members only. Any member of Lok Sabha may move a resolution after the required formalities to expressing lack of confidence in the Council of Ministers. It is here that most of the opposition members try to bring out the lapses and the weaknesses of the government to censor it or to bring it down in the eyes of the people. The ruling party replies to the points raised and defends itself. As long as the ruling party has comfortable majority, there is no danger of defeat. Infact, it is a test of strength, especially in coalition governments.

### C. Financial Powers and Functions

Parliament is considered to be the custodian of public money. No taxes can be realised or money be spent without the approval of the Parliament. Therefore, the annual budget is approved by the Parliament. But the real financial powers lie with the Lok Sabha, (House of the People). According to the Constitution, a Money Bill can be introduced in Lok Sabha only. After it is passed by the Lok Sabha, it is sent to Rajya Sabha for its consideration. Rajya Sabha is supposed to pass or return it with or without any recommendation within 14 days. Lok Sabha may or may not accept the recommendations of Rajya Sabha and the Money Bill is deemed to have been passed.

### D. Electoral Powers and Functions

All the elected members of both the Houses of Parliament form part of the Electroral College to elect the President and the Vice President of India. Besides this, members of Lok Sabha elect their Speaker as well as Deputy Speaker where as members of Rajya Sabha elect their Deputy Chairman only.

## E. Constituent Powers and Functions

The Parliament of India is empowered to amend the provisions of the Constitution, though in a limited way due to the federal character of India according to the method laid down in Article 368. An Amendment Bill may be introduced in either House of the Parliament. After it is passed by each House separately by the special majority, it is sent to the President for his/her consent. Most parts of the Indian Constitution are amended by special majority. But there are certain provisions which need ratification by at least half of the State Legislatures besides being passed by the Parliament.

However, the Supreme Court has ruled that Parliament cannot change the basic structure of the Constitution of India.

## F. Judicial Powers and Functions

The judges of the Supreme Court, High Courts, the President of India and the Vice President may be removed from office through the process of impeachment about which you have read in the previous chapter.

## G. Miscellaneous Powers and Functions

Some of the functions other than mentioned above are also performed by the Parliament:

(a) Proclamation of Emergency declared by the President of India through an Ordinance has to be approved by both the Houses of the Parliament.

(b) Splitting a State to form a new State, merger of two States or changing the boundaries or the name of a State needs Parliament's approval.

(c) It is optional for the States to have a Legislative Council or not. If the concerned State Assembly requests the Parliament, to create or abolish the State Legislative Council, the process has to be approved by both the Houses of the Parliament.

## INTEXT QUESTIONS 22.3

Write True or False.

(i) The term of Rajya Sabha is six years. (True/False)

(ii) A Money Bill can be introduced only in Lok Sabha. (True/False)

(iii) The Parliament is empowered to change even the basic structure of Indian Constitution. (True/False)

## 22.3 LEGISLATIVE PROCEDURE IN THE PARLIAMENT

The basic function of the Parliament is to make laws for which a definite procedure is followed. A bill is a draft of the proposed law. Any bill which is moved by a minister is called a Government Bill and the one moved by a member of the Parliament but not by a minister is called Private Member's Bill. Although, every member of the Parliament has a right to move an Ordinary Bill, yet it is rarely done due to lack of support to the individual in a multi-party system. The bills can also be categorised as Money Bills and the Ordinary Bills.

The Bills that deal with money matters, financial obligation, revenue and expenditure etc, are called Money Bills. Such bills are introduced by a minister only. Non-money Bills are called Ordinary Bills. Some non-money bills become Constitution Amendment Bills also, if they aim at amending any provision of the Constitution. Let us now try to understand how these bills pass through several stages before they become law.

### 22.3.1 Ordinary Bills

(i) **First Reading of the bill** starts with the introduction of the bill in either of the two Houses of Parliament. A request for its introduction along with aims and objectives of the bill is sent to the Presiding Officer. Every bill introduced in the House has to be published in the gazette. On the appointed date, the Minister moves the motion for leave to introduce the bill. If permitted to do so by the House, it is formally introduced.

(ii) **Second Reading of the Bill** is the most important stage in law making. It is here that a general discussion and a clause by clause discussion on the bill is held with or without amendments. After this the House has four options:

(a) The bill may be immediately taken into consideration by the House for clause by clause discussion;

(b) It may be referred to the Select Committee of the House;

(c) It may be referred to a Join-Select Committee of both the Houses;

(d) It may be circulated among the people for eliciting public opinion. In case the House decides to immediately take up the bill for consideration for clause by clause discussion, it is debated; amendments are proposed and put to vote for acceptance or rejection. If the bill is passed, it is sent to the other House where the same procedure is repeated.

If the bill is referred to a Select Committee or Joint Committee of both the Houses, its clause by clause examination takes place, experts or representatives of various sections are heard to know their opinion,

amendments are proposed and a report is submitted in the House on the appointed date. After this the bill is considered clause by clause, and amendments put to vote. If accepted by majority of members present and voting, the amendments are carried otherwise rejected. This completes the second reading of the bill.

(iii) **Third Reading:** At this stage, Minister in charge of the bill asks the House to adopt the bill. Normally no discussion takes place at this stage. The bill is put to vote. If accepted by majority of members present and voting, the bill is passed and is now sent to the other House where it will pass through the same stages and procedure as in the first House.

After the bill is passed in the second House, it is sent back to first House for onwards presentation to the President of India for his/her assent. If the President signs the bill, it becomes an Act or law. The President may also withhold the bill for sometime before taking any decision on it. In case he/she returns it for reconsideration, it has to be passed again by both the Houses with or without amendments. This time, the President has to give his/her assent.

**In case of disagreement** of both the Houses, there is a provision for Joint Sitting of both the Houses. Such a joint sitting of Parliament is summoned by the President and is presided over by the Lok Sabha Speaker. If approved by majority, the bill is deemed to have been passed and is sent to the President for his/her assent.

**Do you know**

- The First joint sitting of the Parliament was held is 1961 to adopt the Dowry Prohibition Bill.
- The Second joint sitting was held in 1978 to adopt Banking Service Commission Abolition Bill.
- Another joint sitting was held is 2002 to adopt the bill to replace the Prevention of Terrorism Ordinance (POTO).

### 22.3.2 Money Bill

A Money Bill can be introduced in Lok Sabha only and that too, with the prior permission of the President. It passes through the same three stages of first, second and third reading. When it is passed by Lok Sabha, it is sent to Rajya Sabha for consideration. Unlike an Ordinary Bill, Rajya Sabha cannot reject a Money Bill. So, the alternatives before the Rajya Sabha are:

(i) to pass the bill as it is, before sending it to the President for assent.

(ii) to return the bill to Lok Sabha with some recommendations. The Lok Sabha may reject all or any of the recommendations after which the bill is considered to have been passed by both the Houses.

(iii) may retain the Money Bill for a maximum period of 14 days but has to return the same with or without any recommendations. In any case, it is considered to have been passed by both the Houses and directly sent to the President for his/her assent. Now, the President has no option but to sign it because prior permission to introduce the bill has already been sought.

### 22.3.3 The Budget

The Budget is an annual financial statement showing annual expected revenue and expenditure of public money. It is not a Bill. It is presented in the Parliament (Lok Sabha) in two parts i.e. Rail Budget and the General Budget. Railway Minister presents the Rail Budget whereas the presentation of General Budget is the responsibility of the Finance Minister.

After a general discussion, the members may ask questions which the minister replies. Now the demands of each ministry or department are discussed and put to vote. For this, a new system of Dpartmental Select Committees has been introduced since 1993-94. The Lok Sabha sets up committees for all major ministries and Departments of the Union Government. These Committees discuss, scrutinise and recommend the budget demands and make recommendations which are voted in the House and accepted without much debate.

## INTEXT QUESTIONS 22.4

**Answer the following questions:**

(a) Differentiate between a Government Bill and a Private Member's Bill.

(b) Differentiate between an Ordinary Bill and a Money Bill with regard to their introduction in the Parliament.

(c) What is a Money Bill?

(d) When does the joint sitting of both the Houses of Parliament take place?

## 22.4 THE STATE LEGISLATURE

### 22.4.1 Composition of the State Legislature

Most of the State Legislatures in India are unicameral consisting of the Legislative Assembly (Vidhan Sabha) and the Governor. Only five States have the bicameral legislatures. Besides the Legislative Assembly, these States have

a Legislative Council (Vidhan Parishad) also. These States are Bihar, Maharashtra, Karnataka, Uttar Pradesh and Jammu & Kashmir.

### 22.4.2 Vidhan Sabha (Legislative Assembly)

Like the Lok Sabha, members of the Legislative Assemblies are directly elected by the people on the basis of Universal Adult Franchise for a five year term, Qualifications to become a member of Vidhan Sabha are also the same as those of Lok Sabha.

The number of members of Vidhan Sabha vary from State to State depending upon the population.

In any case, they cannot be more than 500 and less than 60 members. However, smaller States like Goa and Mizoram have been allowed to have an Assembly of 40 members. Uttar Pradesh has the largest Vidhan Sabha with 403 members. Some of the seats are reserved for members belonging to the Scheduled Casts and Scheduled Tribes. If inadequately represented, one member of the Anglo Indian Community is nominated by the Governor of the State.

As mentioned earlier, the normal term of the Vidhan Sabha is five years. But the Governor can dissolve it earlier if advised by the Chief Minister to do so. The Assembly may also be dissolved in case the Governor recomends Constitutional Emergency under Article 356.

Every Legislative Assembly elects its Speaker and Deputy Speaker from amongst its members who conduct the proceedings of the House. The function, of the Speaker of Lok Sabha and that of the Vidhan Sabha are almost the same. Both of them have a casting vote in case of tie.

## INTEXT QUESTIONS 22.5

Answer the following questions:

(a) Which five States of India have bicameral legislatures ?

(b) Name the State having the largest number of members in Vidhan Sabha.

(c) What is the minimum permissible number of members in a State Assembly?

(d) Who exercises the casting vote in case of a tie in the State Assembly?

(e) Who can dissolve the State Assembly and when?

## 22.5 LEGISLATIVE COUNCIL (VIDHAN PARISHAD)

Like Rajya Sabha in the Union Legislature, Legislative Council (Vidhan Parishad) is the Upper House of the State Legislature (Vidhan Mandal). As

mentioned earlier, only five states in India have Legislative Council. It is the discretion of the State Government to have or not to have a Legislative Council. The creation or abolition of the Upper House can be finalised by the Parliament if a State Assembly passes a resolution to this effect by *Special Majority* which means by a majority of the total membership of the State Assembly and by a majority of not less than two third of the members present and voting.

The number of Vidhan Parishad members should not exceed one-third of the total members of Vidhan Sabha. However it cannot be less than 40. The Vidhan Parishad of Jammu and Kashmir is an exception and has 36 members only. The qualifications to become a member of the State Council are the same as those for Rajya Sabha membership. But the composition is slightly different. Its members are partly elected and partly nominated. The procedure of electing the members is the same as that of the Rajya Sabha members i.e. indirect election on the basis of the principle of proportional representation by means of Single Transferable Vote system.

### The Composition of the Legislative Council

(i) One-third members of the Legislative Council are elected by the elected members of the Vidhan Sabha.

(ii) One-third members are elected by the members of local bodies like municipalities.

(iii) One-twelfth members are elected by the registered graduates in the State with a three year standing.

(iv) One-twelfth members are elected by the teachers of secondary or higher level schools in the State.

(v) The remaining one-sixth members are nominated by the Governor on the basis of excellence in various fields.

Like Rajya Sabha, the State Legislative Council is never dissolved and is a permanent House. One third of its members retire every two years after enjoying a term of six years. The Chairman and Deputy Chairman of the Council are elected by its members from amongst themselves.

## INTEXT QUESTIONS 22.6

**Fill in the blanks:**

(i) The upper house of the bicameral State Legislature of a State is called ..... . (Vidhan Sabha, Vidhan Parishad, Sansad)

(ii) ..... is the final authority to abolish or create Legislative Council in a State. (Vidhan Sabha, Parliament, Governor)

(iii) The Legislative Council of Jammu and Kashmir has ..... members. (36, 40, 56)

(iv) The Vidhan Parishad of Bihar has 96 members in all. Out of these ..... members were nominated by the Governor. (12, 16, 20)

## 22.6 POWER AND FUNCTIONS OF THE STATE LEGISLATURE

Powers and functions of the State Legislature, whether unicameral or bicameral, are almost the same as those of the Union Parliament based on the division of power between the Union and the States. On account of the federal structure of the Indian Constitution, the State Legislatures do not have unlimited authority. As you have read earlier, the powers are divided between the Union and the State based on the Union List, State List and the Concurrent list. Let us study the powers of the State Legislature under the following heads:

### A. Legislative Powers

Law making is the primary function of the State Legislature. It makes laws on 66 subjects included in the State List. It also has the right to make laws on the subjects mentioned in the Concurrent List but it should not contradict any law made by the Parliament on the same subject. In case of contradiction, the law made by the Central Government prevails.

The procedure of law making is the same as in Parliament both in the case of Ordinary Bills (Non-money bills) and the Money bills. Every bill passed by the State Legislature (One House if unicameral and both the Houses if bicameral) is sent to the Governor for his for his/her assent after which it becomes a law.

### B. Financial Powers

The finances of the State are under the complete control of the State Legislature because no expenditure can be incurred without the sanction of the Legislature.

As explained in the case of the Union Parliament, a Money Bill can be introduced only in the Lower House i.e. the Legislative Assembly and that too with the prior permission of the Governor. Since 23 States of India have the Legislative Assembly only, after passing the bill, it is sent to the Governor for assent who has no option but to give consent. In case, the Legislature is bicameral and has a Legislative Council also, the bill passed by the Assembly is sent to the Council. Like Rajya Sabha at the Centre, the State Legislative Council has limited powers and the Bill has to be returned to the Lower House within 14 days.

Recommendations by the Council if any, are not binding on the Assembly. In either case the bill is deemed to have been passed by both the Houses and is sent to their Governor for signatures.

### C. Control over the Executive

As a special feature of the Parliamentary form of government, the State Legislatures also keeps control over the Council of Ministers headed by the Chief Minister.

Asking questions, adjournment motion, calling attention motion, no-confidence motion etc are some of the ways to keep the executive under control. In case a situation arises, the State Assembly can remove any individual minister or the entire Council of Ministers by adopting a vote of no-confidence against them.

### D. Electoral Functions

The elected members of the Vidhan Sabha take part in the election of the President of India.

### E. Constitutio nal Functions

You have already read about the procedure of amending the Indian Constitution. Some parts of the Constitution after being passed by the Parliament by a special majority require ratification by the State Legislatures of at least half the States. However, a constitutional amendment cannot be initiated in the State Legislature.

## INTEXT QUESTIONS 22.7

Write True or False.

(i) The State Legislature has a limited role in amending the Constitution. (True/False)

(ii) One third of the members of the State Legislative Council are elected by the elected members of the Legislative Assembly. (True/False)

(iii) Centre and the States both can make laws on the subjects contained in the Concurrent List. (True/False)

### Limitations of the Powers of the State Legislature

The powers of the State Legislature are limited in many ways.

- If any State law on a subject in the Concurrent List is in conflict with the Union law on the same subject; the law made by the Parliament shall prevail.
- Some of the bills cannot be introduced in the State Legislature without seeking prior approval of the President of India. For example: A Bill

regarding imposing restrictions on trade and commerce within the State or with other States.

- Before giving assent; the governor may send a bill passed by the Legislature for the consideration of the President. Such a Bill becomes a law only after the President gives his/her assent.
- Be it the national emergency or the President's Rule in a State, the Parliament may legislate on any subject of the State List:
- The Parliament can also make laws on a subject of the State List if:

  (a) two or more than two State Legislatures make a request to do so or

  (b) Rajya Sabha passes a resolution by 2/3 majority to do so or

  (c) a rule or law becomes essential for the performance of an international responsibility

  No law can be enacted by the State Legislature that may violate the Fundamental Rights of the people. Any law passed the State Legislature can be declared void, if found unconstitutional, by the Supreme Court or the High Court.

## WHAT YOU HAVE LEARNT

The Union Parliament called Sansad comprises of a lower house called Lok Sabha, an upper house called Rajya Sabha and President of India. The Lok Sabha is a directly elected house of the people where as Rajya Sabha which represent the States in Indian Union and its members are elected by elected Members of the Legislative Assembly i.e. Vidhan Sabha. Although Lok Sabha has a fixed term of 5 years, yet it can be dissolved earlier also by the President of India. Rajya Sabha on the other hand is a permanent House whose members have a fixed term of six years. Both the Houses have their Presiding officer to conduct the proceedings of the House. The Parliament performs various functions like legislative, executive, financial, electroal functions etc. After going through these functions, you must have realised that Lok Sabha is comparatively more powerful than Rajya Sabha.

The State Legislatures consist of the Legislative Assembly i.e. Vidhan Sabha, the Legislative Council i e the Vidhan Parishad (only in five states) and the Governor. Most of the states in India have a unicameral legislature consisting of Vidhan Sabha and the Governor.

Members of Vidhan Sabha are directly elected by the people on the basis of Universal Adult Franchise whereas the members of the Legislative Council are partly elected indirectly and partly nominated by the Governor for a fixed period of six years.

Like the Rajya Sabha at the Centre, the State Legislative Councils are also a permanent House since one third members retire every two years. Besides law making on the subjects in the State List and the Concurrent List, the State Legislature also performs financial and electroal functions and keeps a control over the Council of Ministers in the State. In the case of Constitutional break down, the President's Rule can be imposed in the State on the advice of the Governor.

## TERMINAL QUESTIONS

1. Describe the composition of the Lok Sabha and the Rajya Sabha.
2. Mention the different stages a bill passes through before becoming a law.
3. Why is Rajya Sabha called a permanent house?
4. When does the Joint Sitting of both the houses of Parliament take place? Who presides over such a Joint Sitting?
5. How far is it correct to say that Rajya Sabha has almost no control over the financial matters of the country? Explain.

## ANSWER TO INTEXT QUESTIONS

### 22.1

(a) Rajya Sabha is called a permanent house because it never gets dissolved.

(b) The American Senate has equal representation from all the States (Two from each state) whereas in Rajya Sabha, the representation of the States is proportionate to the population of the State.

(c) Elected Members of the State Legislative Assemblies.

### 22.2

(a) Anglo – Indian Community.

(b) Speaker of Lok Sabha.

(c) (i) Sikkim, (ii) Mizoram, (iii) Arunanchal Pradesh

(d) Deputy Speaker.

### 22.3

(i) True

(ii) True

(iii) False

## 22.4

(a) Any bill which is introduced by a minister is called a Government Bill whereas a Private Member's Bill can be introduced by any member of the Parliament in individual capacity. Normally.

(b) An Ordinary Bill can be introduced in any of the two Houses of Parliament. whereas a Money Bill can only be introduced in Lok Sabha and that too, with the prior permission of the President.

(c) A Money Bill deals with the imposition, abolition, alteration of any tax or related to any financial matter.

(d) When there is a disagreement between Lok Sabha and Rajya Sabha over the passing of an Ordinary Bill.

## 22.5

(a) Bihar, Maharashtra, Karnataka, Uttar Pradesh and Jammu Kashmir.

(b) Uttar Pradesh (403 members)

(c) 60.

(d) Speaker of the Vidhan Sabha.

(e) The Governor of the State can do so on the advice of the Chief Minister.

## 22.6

(i) Vidhan Parishad

(ii) Parliament

(iii) 36

(iv) 16

## 22.7

(i) True

(ii) True

(iii) True

Notes

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# THE JUDICIARY

When you read the Constitution of India, you will come to know that it is characterised as a federal Constitution. By federal Constitution we mean a written Constitution which provides the division of powers between Central and the State Governments. It is the supreme law of the land. But the language of the Constitution is very complex as its meaning is likely to be interpreted by different authorities at different times in different manners. Hence, it is natural that dispute might arise between the Centre and its constituent units (primarily the States) regarding their respective powers. Therefore, in order to maintain the supremacy of the Constitution, there has to be an independent and impartial authority which will decide disputes between the Centre and the States and States *inter se* (among States). This function has been entrusted upon the Supreme Court of India.

The Constitution of India has provided a single integrated and unified judicial system for the whole country. It means that for the entire country, there is one unified judicial system, one hierarchy of courts with the Supreme Court as the highest or the apex court. It is also the highest and the final interpreter of the Constitution and the general law of the land.

## OBJECTIVES

After studying this lesson, you will be able to:

- know about the procedure of appointment of Judges to the Supreme Court and the High Courts of India;
- explain the jurisdiction of the Supreme Court and the High Courts;
- know the powers of both the Supreme Court and the High Courts of India;
- appreciate the significance of 'Judicial Activism';
- appreciate the role of PIL in dispensing justice to the weak and the downtrodden;

- recognise the role of Head of the State and the the Heads of its units i.e. States in the process of recruitment of the judicial heads of the Courts; and
- recognise the significance of the Constitution as the Fundamental Law of the country.

## 23.1 COMPOSITION AND ORGANISATION OF THE SUPREME COURT

The Supreme Court of India consists of a Chief Justice and, 30 other Judges. The Parliament may increase this number by law. Originally, the total number of judges was seven but in 1977, it was increased to 17 and in 1986 to 25, excluding the Chief Justice. Later in 2009, it was fixed at 31 Judges including the Chief Justice of India.

Under article 124(2), Supreme Court judges are to be appointed by the President "after consultation with such judges of the Supreme Court and of the High Courts as the President may deem necessary". The provision in the Article says that in the case of appointment of a judge other than the Chief Justice, the Chief Justice of India shall always be consulted. It is obligatory for the Government in which it has to consult the Chief Justice and other judges.

Significantly, the appointment is not required to be made in consultation but only 'after consultation', and the opinion should be in written. In actual practice, after receiving the opinion of the Chief Justice, the Cabinet deliberates on the matter and advises the President in regard to the persons to be appointed. The President acts on the advice.The Chief Justice has to consult four senior most Judges of the Supreme Court and if two of the four disagree on some name, it can not be recommended. Infact, decisions are to be taken by consensus where the Chief Justice and at least three of the four Judges agree.

**Figure 23.1:** Supreme Court of India

In case of the Chief Justice, the senior most Judge is usually appointed. The practice has virtually been transformed into a convention and is followed by the executive without any exception. But on April 25, 1973, the convention was broken when the Government appointed Justice A. N. Roy superseding three of his senior colleagues. The government's action has been criticised of arbitrariness and undermining the independence and impartiality of the Judiciary. To avoid such types of controversies, a bill was introduced in the LokSabha by the National Front Government for setting up a National Judicial Commission in 1990 by the then Law Minister, Dinesh Goswami, empowering the President to constitute a high level Judicial Commission for making recommendation for the appointment of the Judges to the Supreme Court (other than the Chief Justice of India), Chief Justice of High Courts and to the transfer of Judges from one High Court to another. But the Constitutional Amendment Bill lapsed consequently upon the dissolution of the Lok Sabha.

A person to be qualified for appointment as a Judge of the Supreme Court–

- must be a citizen of India;
- should have been a Judge of the High Court for at least five years;
- should have been an advocate of the High Court for at least ten years; and
- is a distinguished Jurist in the opinion of the President

Interestingly, a non-practising or an academic lawyer may also be appointed as Judge of the Supreme Court, if he/she is, in the opinion of the President, a distinguished Jurist. But in India so far, no non practising lawyer has been appointed as a Judge of the Supreme Court.

Every person appointed as a judge of the Supreme Court, before he/she enters upon his office, takes an oath before the President or some other person appointed by him in the form prescribed in III Scheduled of the Constitution.

Every Judge of the Supreme Court holds office until the age of 65 years. A judge may be removed from his/her office only by an order of the President passed after an address by each House of Parliament for his removal on the ground of 'proved misbehavior or incapacity', supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members present and voting in the same session. The procedure of the presentation of an address for investigation and proof of misbehavior or incapacity of a Judge will be determined by Parliament (Article 124 (5)).The Supreme Court has held that a Judge of the Supreme Court or High Court can be prosecuted and convicted for criminal misconduct. The expression 'misbehavior' in article 124 (5) includes criminal misconduct as defined in the Prevention of Corruption Act.

The Constitution prohibits a person who has held office as a judge of the Supreme Court from practising law before any Court in the territory of India (Article 124(6) and (7)). But under Article 128, the Chief Justice may appoint the retired Judges of the Supreme Court to sit and act as *Ad hoc* Judges in the Supreme Court.

When the office of the Chief Justice of India is vacant or when the Chief Justice is unable to perform the duties of his office due to absence, the President shall appoint an Acting Chief Justice from among the Judges of the Supreme Court to perform the duties of the Chief Justice (Article 126).

If at any time, there is no quorum of judges of the Supreme Court available to hold or continue any session of the Court, the Chief Justice of India is empowered to appoint *Ad hoc* judges in the Supreme Court from among judges of High Courts, having qualifications to be appointed Judges of the Supreme Court, for such period as he/she deems necessary. He/she can do so only with previous consent of the President and after consultation with the Chief Justice of the High Court concerned. The Judge so appointed is duty bound to give priority to the Supreme Court duties.

The Chief Justice of India may also invite a retired Judge of the Supreme Court or a retired Judge of the High Court having the qualification to be Judge of the Supreme Court, to sit and act as a Judge of the Supreme Court for such period as he deems necessary. This has to be done with the previous consent of the President and also of the person to be appointed (Article 127 and 128).

Judges of the Supreme Court are to be paid such salaries as may be determined by Parliament by law and until so determined salaries are laid down in the Second Schedule (Article 125). In addition to this, they are also allowed sumptuary allowances, rent free furnished residences, telephone, water, electricity, medical and many other facilities.

The Constitution provides that Supreme Court shall sit in Delhi. However, the Chief Justice of India may with the previous approval of President be able to sit in such other place or places as he/she may decide (Article 130). At present, the Supreme Court is functioning from Delhi.

## INTEXT QUESTIONS 23.1

1. What is the present number of Judges in the Supreme Court, including the Chief Justice of India?
2. How does the President of India appoint the Judges of the Supreme Court, other than the Chief Justice?

Notes

3. How is the Chief Justice of India appointed? Mention the case which was an exception to the accepted convention.
4. Why and when was a bill introduced to set up a National Judicial Commission?
5. What are the grounds on which the Judge of Supreme Court can be removed?

## 23.2 POWERS AND JURISDICTION OF THE SUPREME COURT

Article 129 provides that the Supreme Court shall be a Court of record and shall have all powers of such a Court. Being the highest court of the land, its proceedings, acts and decisions are kept on record for perpetual memory and for presentation as evidence, in support of the law. Being a Court of record it implies that its records can be used as evidence and cannot be questioned for their authenticity in any court. Court of record also means that it can punish for its own contempt. But this is a summary power, used rarely and under pressing circumstances. It does not restrict genuine and well intentioned criticism of Court and its functioning. Fair and reasonable criticism of judicial acts in the interest of public good does not constitute the contempt.

### 23.2.1 Jurisdiction

The Supreme Court has *original, appellate* and *advisory* jurisdictions.

### A. Original Jurisdiction

Original Jurisdiction means the power to hear and determine a dispute in the first instance. The Supreme Court has been given exclusive *Original Jurisdiction* which extends to disputes:

- between the Government of India and one or more States.
- between the Government of India and one or more States on one side and one or more States on the other.
- between two or more States.

The Supreme Court in its original jurisdiction cannot entertain any suits brought by individuals against the Government of India. The dispute relating to the original jurisdiction of the Court must involve a question of law or fact on which the existence of legal right depends. This means that the Court has no jurisdiction in matters of political nature.

However, this jurisdiction shall not extend to a dispute arising out of a treaty, agreement etc. which is in operation and excludes such jurisdiction (Article 131).

The jurisdiction of Supreme Court also excludes in inter-State water disputes (Article 262), matters referred to the Finance Commission (Article 280) and adjustment of certain expenses and pensions between the Union and States (Article 290).

If any dispute is to be brought before the Supreme Court, it must involve a question of law on which the legal right depends. Under Article 139A, the Supreme Court may transfer to itself cases from one or more High Courts if these involve questions of law or of great importance. The Supreme Court may transfer cases from one High Court to another in the interest of justice.

The Original Jurisdiction of the Supreme Court also extends to cases of violation of the Fundamental Rights of individuals and the Court can issue several Writs for the enforcement of these rights (Article 32). It is a unique feature of our Constitution that in principle, any individual can straightway approach the highest Court in case of violation of his/her Fundamental Rights.

## B. Appellate Jurisdiction

*The Appellate Jurisdiction* of the Supreme Court extends to civil, criminal and constitutional matters. In a civil matter, an appeal lies to the Supreme Court from any judgment, decree or final order of a High Court if the High Court certifies under Article 134A that a 'substantial question of law' of general importance is involved and the matter needs to be decided by the Supreme Court. The High Court grants certificate only where there have been exceptional circumstances where substantial and grave injustice has been done. Thus, a certificate cannot be granted by the High Court on mere question of fact, where no substantial question of law is involved.

In criminal cases, an appeal to the Supreme Court shall if the High Court:

- has reversed an order of acquittal of an accused person and sentenced him to death.
- has withdrawn for trial before itself any case from any subordinate court to its authority and has in such trial convicted the accused person and sentenced him to death (Article 134).

It is to be noted that before the commencement of the Constitution, there was a Federal Court in India. It was created by the Government of India Act 1935 and has been abolished by the Constitution of independent India. Article 135 was included in the Constitution to enable the Supreme Court to exercise jurisdiction in respect of matters where the Federal Court had the jurisdiction.

Under Article 136 the Supreme Court, by its own, may grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause

or matter passed or made by any court or tribunal in the territory of India. These powers of the Supreme Court to grant 'special leave to appeal' are far wider than the High Court. The Supreme Court can grant special leave against judgments of any court or tribunal in the territory, except the military courts, and in any type of cases, criminal or revenue. But the Supreme Court has itself said that it will grant special leave to appeal only in cases where there has been gross miscarriage of justice or where the High Court or Tribunal is found to have been wrong in law. So, it is not taken as a usual practice.

**Do you know**

A 'Tribunal' is a body of authority although not a Court, having all the attributes of a Court, which has judicial powers to adjudicate on the question of law or fact affecting the rights to citizens in a judicial manner.

Article 137 provides for the Supreme Court having the power to review its own judgments and orders. The Supreme Court has held that a judgement of the apex Court of the land is final. A review of such a judgement is an exceptional phenomenon, permitted only where a grave error is made out.

### C. Advisory Functions

Article 143 of the Constitution confers upon the Supreme Court the Advisory Jurisdiction. The President may seek opinion of the Supreme Court on any question of law or fact of public importance on which he/she thinks it is expedient to obtain such an opinion. On such references from the President, the Supreme Court may report to him/her its opinion thereon. The opinion is only advisory, which the President is free to follow or not to follow. Also, it depends upon the Supreme Court whether to give opinion or not depending on the case.

Article-139 lays down that Parliament may confer on the Supreme Court power to issue directions, orders or writs in matters not already covered under Article 32. Under Article-140, Parliament may supplement the powers of the Supreme Court to enable it to perform effectively the functions placed upon it under the Constitution. Law declared by the Supreme Court is binding on all courts in India under Article-141. Article-142 provides that the Supreme Court in exercise of its jurisdiction may pass such decrees or orders as necessary for doing complete justice. The decree or order made by the Court shall be enforceable throughout the territory of India in such a manner as prescribed by the Parliament. Until provision is made by the Parliament, the orders of the Court will be enforced in the manner prescribed by the President.

For purpose of giving effect to the directions and decisions of the Supreme Court, all authorities, civil and judicial, in the territory of India, have been made subordinate to the authority of the Supreme Court (Article 144). The Supreme Court may from time to time, and with the approval of the President, make rules for regulating generally the practice and procedure of the Court.

## INTEXT QUESTIONS 23.2

1. What does the term 'legal right' mean?
2. Under which circumstances can the Supreme Court has the power to transfer to itself cases from one or more High Courts?
3. Which Article entitles the Supreme Court to issue 'Writs' for the protection of Fundamental Rights?
4. The Appellate Jurisdiction of Supreme Court extends to which type of cases?
5. Define a 'Tribunal'.

## 23.3 JUDICIARY AS THE GUARDIAN OF CONSTITUTION AND PROTECTOR OF FUNDAMENTAL RIGHTS

When the word 'Court' comes in your mind, what is the first thing that strikes you? It is justice. This is because the courts or the judiciary is endowed with the task of providing justice to everyone and everywhere. In India, the judiciary intervenes when Fundamental Rights, as provided in Part III of the Constitution, are violated by any person, authority or the State.

Judiciary acts in accordance to the Article-32 which prescribes the mechanism for enforcement of Fundamental Rights and justice. Dr. B. R. Ambedkar said about the importance of the Article-32 that, "If I was asked to name any particular Article in this Constitution as the most important Article without which this Constitution would be a nullity…I could not refer to any other Article except this one… It is the very soul of the Constitution and the very heart of it". Hence Article-32 of the Constitution provides an effective remedy for the enforcement of the Fundamental Rights.

Article-32 (1) guarantees the rights to move to the Supreme Court by 'appropriate proceedings' for the enforcement of Fundamental Rights conferred by Part III of the Constitution. Clause (2) of Article 32 confers power on the Supreme Court to issue directions, orders or writs including writs in the nature

of Habeas Corpus, Mandamus, Prohibition, Quo-warranto and Certiorari. Under clauses (3) of Article 32, Parliament can empower any other Court to exercise within its jurisdiction all those powers which were exercisable by the Supreme Court under clause (2). Clause (4) says that the rights guaranteed under this Article shall not be suspended except otherwise provided in the Constitution. Thus, it provides remedy for the protection of Fundamental Rights from legislative and executive interference. Hence, it is clear that whenever there is a violation of Fundamental Rights, any person can move to the Court for an appropriate remedy.

The Judicial system adopted by our country is based on hierarchy of the courts. From the Subordinate Courts to the Supreme Court, we have a chain of the Courts that works at every level to tender justice. Hence, it is expected that the common people first seek justice from the lower level and if there is complexity in the case, then they are free to move the higher one. In this way, to lessen the burden from the Supreme Court, there is a hierarchy of Courts at different levels.

The Supreme Court and the High Courts have been provided with the powers to issues writs under Article 32 and Article 226. Parliament can also empower any Court to issue writs as similar to that of the Supreme Court and the State High Courts. Interestingly, the power of the High Court to issue Writs is wider than the power conferred on the Supreme Court. High Courts have the power to issue writs not only for the enforcement of Fundamental Rights but also for the rights other than Fundamental Rights (Article 226). There are five writs provided in the Constitution about which you must have studied in the chapter of Fundamental Rights.

Besides the writs, the Supreme Court and the High Courts can issue other directions and orders in the interest of justice to the people. Judiciary through these writs and other available mechanism employs its best to protect Fundamental Rights and freedoms of the individuals particularly those provided in the Constitution. Hence, it is called guardian of the Constitution and the protector of Fundamental Rights.

## INTEXT QUESTIONS 23.3

1. Which Court has the wider powers to issue 'Writs' in the context of Fundamental Rights?
2. Why is Judiciary called the protector of Fundamental Rights?
3. How is the judicial system of India based on the hierarchy of courts?

## 23.4 PUBLIC INTEREST LITIGATION AND THE JUDICIAL ACTIVISM

The Public Interest Litigation (PIL) is a strategic arm of the legal aid movement which is intended to bring justice within the reach of the poor masses. It is a device to provide justice to those who individually are not in a position to have access to the courts. It was initiated for the benefit of that class of people, who had been denied their constitutional and legal rights because of their socio-economic disabilities. The aim of PIL is to give the common people of this country, access to the courts to obtain legal redress.

According to the traditional anglo-saxon concept of *locus standi*, only the person whose rights were violated could seek for judicial redress. No one could file a petition in the court on his behalf. This doctrine was evolved in an era when the courts were mainly concerned with the rights of the individual. Therefore, it has been felt that traditional interpretation of *locus standi* should be changed to bring justice within the reach of the poor masses. According to the new interpretation of this doctrine, when the rights of an individual or a class of persons are violated and if by the reasons of poverty or disability they cannot approach the court themselves, any public spirited person or institution, acting in good faith can move to the court for the judicial redress.

In a landmark case of *'S.P. Gupta vs. Union of India'* popularly called the *Judges Case*, Justice P. N. Bhagwati said that major impediment in bringing the problems of under privileged before the courts was the traditional rule of *locus standi*. Rejecting the notion, he held that any public spirited individual can move the Court in case where the person concerned seeks judicial redress, provided that the person is acting in the interest of public and not for personal gain, private profit, political motivation or other considerations. Thus, the court has now done away with orthodox bar of *locus standi* and now it can be approached even by a letter which can be treated by the court as writ petition.

The first reported case of PIL was in 1979 which has focused on the inhuman conditions of prisons and undertrial prisoners. In *'Hussainara Khatoon vs. State of Bihar'*, PIL was filed by an advocate on the basis of a news report highlighting the plight of thousands of undertrial prisoners languishing in various jails. It had led to a chain of proceedings, resulting in the release of over 40,000 undertrial prisoners. After this case the Supreme Court has defined the right to speedy justice as a basic fundamental right which has been denied to the prisoners.

But still, there were many who were at the whims of the legal and judicial authorities and who have paid a lot than which is expected from them. The Supreme Court has developed a '*compensatory jurisprudence*' to provide an

amnesty for those who were victimised by justice providing authorities. The compensatory jurisprudence was most clearly articulated by the Court in 1993 in *'Nilabati Behra vs. State of Orissa'* in response to a PIL alleging death of a boy of 22 years in police custody. The Court evolved the principle of public law doctrine of compensation for violation of rights. According to this doctrine, it is the liability of the State for violation of rights. In this case, the Court awarded Rs. 1,50,000 to the mother of the boy as compensation for custodial death.

Similarly, in *'Bandhua Mukti Morcha vs. Union of India'* case one organisation dedicated to the cause of release of bonded labourers informed the Supreme Court through a letter that they conducted a survey of the stone quarries situated in Faridabad District of the State of Haryana and found that there were a large number of labourers working in these stone quarries under inhuman and intolerable conditions and many of them were bonded labourers. The petition requested for a writ to be issued in the view to end the misery, suffering and helplessness of these labourers. The Supreme Court treated the letter as a writ petition and appointed a Commission of Inquiry and ordered the release and rehabilitation of all bonded labourers. Hence, PIL has become the sole instrument of social revolution.

## Judicial Activism

The Supreme Court has now realised its proper role in a Welfare State and it is using this new strategy not only for helping the poor for enforcing their Fundamental Rights but for the transformation of the whole society as ordered for a crime free society. The Supreme Court's role in making up for inefficiency of the legislature and the executive is commendable. This is the evolving Judicial Activism of the higher courts.

'Judicial Activism' is a layman's term for the role of Judiciary in initiating the policies to dispense justice. It is usually through the PIL, but the Supreme Court from time to time has given directions, passed writs and issued orders to redress the injustice either on the request or by its own.

Nevertheless, 'Judicial Activism' has been under constant criticism from other two organs of the government, the Executive and the Legislature. Though it emerged only as a result of their inefficiency or lukewarm efforts to provide justice even then they target judiciary on the legal grounds of exceeding its arena. Standing apart of the criticism it is the people who have to decide that what is wrong and what is right, and when it is the question of providing justice, the technicalities should not come in the way to foster justice. Judiciary has to act if and when time comes and other institutions failed on their respective parts.

## INTEXT QUESTIONS 23.4

1. What is the primary aim of Public Interest Litigation?
2. What does the traditional anglo-saxon concept of *locus standi* means?
3. Why is PIL called the sole instrument of social revolution?
4. Which two drawbacks of judiciary resulted into 'Judical Activism'?
5. In which case the Court has treated a letter as a writ petition?

## 23.5 HIGH COURT AND THE SUBORDINATE COURTS

The Constitution of India provides a High Court for each State. The Parliament may, however, establish a common High Court for two or more States and a Union Territory (Article 214 & 231). Similar to the Supreme Court, every High Court is also a Court of record and has the entire original and appellate jurisdiction together with the power to punish for contempt (Article 215). The Chief Justice of a High Court is appointed by the President after consulting the Chief Justice of India and Governor of the State and in case of appointment of Judges, other than the Chief Justice, the Chief Justice of the concerned High Court is also consulted.

For a person to be appointed as a Judge of the High Court he/she must:

- be a citizen of India
- have ten years of service in Judicial Office, or
- have ten years of experience as a High Court Advocate

Every High Court Judge must take an oath of office. He/she holds the office until the age of 62 years. He/she can only be removed from his office in the

**Figure 23.2:** High Court, Kolkatta

same manner as provided for the removal of a Judge of the Supreme Court. After retirement, he/she is also restricted to plead before the court he retired from and subordinate courts but he/she can practice in other High Courts and the Supreme Court. Every High Court Judge is entitled to a salary and allowances as decided by Parliament or as specified in the Second Schedule of the Constitution.

After Consulting the Chief Justice of High Court, the President can transfer Judges from one High Court to the other (Article 222). He may also appoint an acting Chief Justice of the High Court and if needed, the additional and other acting Judges for a limited period of two years. Also, the Chief Justice of a High Court with the consent of the President can appoint a retired judge to sit and act as a Judge.

Every High Court shall consist of a Chief Justice and such other Judges as the President may appoint from time to time (Article 216). Each High Court has powers of superintendence over all the Courts and Tribunals except the Tribunals ofArmed Forces (Article 227). When a High Court finds that any lower court has a case pending, which has a substantial question of law, then it can take the case itself for determination or decide the question and send it back to the same court for determination (Article 228).

Article 226 provides that every High Court under its jurisdiction has power to issue writs for enforcement of the Fundamental Rights or for any other purpose. By inserting the word 'any other purpose' the High Court has been given much wider power than the Supreme Court. It can issue writs in all the cases of breach of any right while Supreme Court can issue only in the breach of Fundamental Rights. But it should be remembered that the writ in cases other than those of violation of Fundamental Rights is not a normal one. It is an extraordinary remedy which can be expected in special circumstances.

Every Court has the control of its staff. The salaries and allowances of the Judges and of the High Court staff, similar to the Judges of Supreme Court are charged on the Consolidated Fund of the State. The officers and staff of High Courts are appointed by the Chief justice or other such Judge or officer as he/she may decide. The terms and conditions of services of the staff and officers of the court are decided by the rules made by Chief Justice and approved by the President (Article 229). The jurisdiction of a High Court may be extended to or excluded from a Union Territory (Article 230).

As the decisions of the Supreme Court are binding on all courts in India, similarly those declared by the High Court are binding on all subordinate courts within the State and within the territory covered by its jurisdiction.

The Governor after consulting the High Court shall appoint the District Judges. A person who has at least seven years of experience at the bar is eligible for the position of a District Judge (Article 233).

Appointments of persons other than District Judges to the Judicial Service of the State are made by the Governor in consultation with the State Public Service Commission and the High Court (Article 234).

The High Court has an entire administrative control over the District Courts and other lower Courts regarding posting, promotions and grant of leaves etc. to any person belonging to the Judicial service of a State and holding any post inferior to the post of a Judge (Article 235). Article 236 is the interpretation clause and various terms while Article 237 empowers the Governor to apply the provisions regarding Subordinate Courts to any class or classes of magistrate in the State.

Over all, Judiciary as a pillar of the democracy, shall stand firm to deliver justice for the sake of mankind. For its impartiality and responsibility it has been kept independent of the influence of the Legislature and the Executive. With the evolution of 'Judicial Activism' and its instruments like the one of PIL has given more and more responsibilities on it. But, in practical terms if the legislative and the executive shall stand accountable and responsive on their duties, then there is no requirements on the part of Judiciary to exceed its jurisdiction.

## INTEXT QUESTIONS 23.5

1. How does the President of India appoint the Judges of the High Courts?
2. Mention any two functions of the High Court.
3. Why is judiciary called the pillar of democracy?

## WHAT YOU HAVE LEARNT

We are having a hierarchy of Courts from Supreme Court to the High Courts and the Subordinate Courts at the lower level.

Justice should be free from any favour or influences. So, judiciary has been kept independent of legislative and executive interference.

Judiciary has been provided with the Writ jurisdiction for protection of Fundamental Right of the people. Judiciary is provided with various powers which helps it to constitute as the guardian of the Constitution.

PIL has been evolved as an instrument of social revolution, that has helped in providing justice to the vulnerable and downtrodden.

'Judicial Activism' has emerged as a result of the failure of legislature and executive at their part.

The Supreme Court and the High Courts have almost all the identical powers and jurisprudence.

The Subordinate Courts and the inferior Courts have to follow the rulings of the Higher Courts, including the Staff to assist them.

## TERMINAL QUESTIONS

1. Describe the composition of the Supreme Court with reference to the appointment of the Judges?
2. What are the grounds for the removal of the Judges of the Supreme Court? Explain the procedure of removal.
3. Expalin the Jurisdiction of the Supreme Court of India.
4. What is meant by 'Judicial Activism' and how does it help in the redressed of injustice?
5. State with an example the role of PIL in the protection of rights of the people.
6. Explain the powers and functions of the High Court.

## ANSWER TO INTEXT QUESTIONS

### 23.1

1. Thirty-One.
2. The President of India appoints the judges of the Supreme Court after consultation with such judges of the Supreme Court, he/she may deem necessary. Besides this, the Chief Justice shall always be consulted.
3. Chief Justice of India is also appointed by the President. Usually, the senior most judge of the Supreme Court is appointed as Chief Justice of India. The exception to this was the appointment of Justice A. N. Ray superseding his three senior collegues.
4. The Law Minister, Dinesh Goswamin of the National Fornt government introduced a bill to set up a National Judicial Commission in 1990. It was to be constituted to make recommendations for the appointment of judges to the Supreme Court (other than the Chief Justice).
5. On the ground of 'proved misbehavior or incapacity'

## 23.2

1. The term legal right means a right recognised by law and being enforced by the State not necessarily in a Court of law.
2. The Supreme Court can grant a special leave to appeal only in case where there has been gross miscarriage of justice or where the High Court or Trobunal is found to have been wrong in law.
3. Article 32
4. Civil, Criminal and Constitutional cases.
5. A 'Tribunal' is a body of authority although not a Court, having all the attributes of a Court, which has judicial powers to adjudicate on question of law or fact affecting the rights to citizens in a judicial manner.

## 23.3

1. The High Court
2. Besides 'Writs', the judiciary can issue other directions and orders and use other available mechanism to protect Fundamental Rights.
3. We have a chain of courts from the Subordinate Courts to the Supreme Court. The common people first seek justice from the lower courts. In case complexity, they are free to move to the higher court and so on. This makes the hierarchy of Courts.

## 23.4

1. The Primary aim of 'PIL' is to bring justice within the reach of the poor masses and give them access to the courts to obtain legal redress.
2. It means that only the person whose rights were violated could seek for judicial redress
3. - It tends to bring justice within the reach of the poor mases.
   - It leads to speedy justice
   - It has changed the plight of thousands of under trials.
   - Any body can seek justice on behalf of these who are illiterate, poor, the down trodden.
4. (i) Inefficiency and lukewarm efforts to provide speedy justice.

   (ii) Delay in justice due to excessive technicalities.
5. It was accepted in 'Bandhua Mukti Morcha vs Union of India' case related to misery, suffering and helplessness of bonded labour in Haryana.

## 23.5

1. The High Court judges are appointed by the President after consulting the chief Justice of India, Chief Justice of the State High Court and Governor of the State concerned.
2. (i) The High Court issues 'Writs' or orders for the protection of Fundamental Rights.

   (ii) It hears/entertains appeal for the cases decided in subordinate courts.
3. It is pillar of democracy because

   (i) it stands firm to deliver justice.

   (ii) it gives the correct interpretation to the Consitutional matters.

   (iii) it ensures public interest and promotes Welfare State.

24

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# ENVIRONMENTAL LAW

The 'Environment' is very important for us to understand because it constitutes our surroundings and affects our ability to live on the earth. It comprises of the air we breathe, the water that covers most of the earth's surface, the plants and animals around us, and much more. It is therefore, very important to understand and apprecaite the importance of 'environment' in our daily life. In recent years, scientists have been carefully examining the various ways by which people affect the 'Environment'. They have found that we are causing air pollution, deforestation, acid rain, and other problems that are dangerous both to the earth and to ourselves.

You may have heard of laws, rules and regulations to deal with the above-mentioned situations. The Government in the last few decades has shown keen interest in protecting and promoting the environment and consequently enacted various Environmental Laws.

This lesson aims at discussing the details about the environment and its degradation with special reference to environmental pollution. The lesson further focuses on the laws pertaining to the protection of environment from pollution and other environmental issues. The discussion is also on other environmnet related issues.

## OBJECTIVES

After completing this lesson, you will be able to:

- explain the term 'environment; and its importance in our life;
- find out what is 'environmental pollution' and what are the various kinds of 'pollution';
- appreciate the need for protection of environment;
- identify the factors responsible for environmental pollution;
- know the various laws relating to the protection and promotion of environment; and
- understand the functions of Central Pollution Board and the State Pollution Boards.

## 24.1 MEANING OF ENVIRONMENT

The word 'environment' is derived from the French word *'environner'*, which means 'to encircle' or to surround. The most suitable definition of environment is as follows:

> *It is the sum total of water, air and land and the interrelationships that exist among them with human beings, other living organisms and materials.*

The geographical meaning of environment is as follows:

> *It is a combination of living and non-living things and their mutual interaction with each other which leads to an ecosystem.*

The environment encompasses all living and non-living things occurring naturally on earth. The Honourable Supreme Court has the following definition of 'environment':

> *"Environment" is a difficult word to define. Its normal meaning relates to the surroundings, but obviously, that is a concept which is relatable to whatever object it is, which is surrounded. Environment is a polycentric and multifaceted problem affecting the human existence.*

Today protection of 'environment' is a global issue as it concerns all countries irrespective of their size, stage or development or ideology. Today, the interaction between society and nature is so extensive that the question of environment has assumed large proportions, affecting humanity at large.

### INTEXT QUESTIONS 24.1

1. Define the term 'Environment'.
2. Give the definition of 'Environment' as given by the Supreme Court of India.

## 24.2 ENVIRONMENTAL POLLUTION

The term 'pollution' refers to unfavourable alteration to our surroundings, wholly or largely as a by-product of human's action through direct and indirect effects of changes in energy pattern, chemical and physical construction and abundance of organisms. Thus, it is the addition of any foreign material to water, air or soil, which may change immediately or after some time, the natural properties of these basic constituents further causing some unfavourable change by making them unfit and injurious. Industrialization, poverty, population-explosion, urbanization, over-exploitation of resources, etc. are some of the factors which have contributed to environmental deterioration.

### 24.2.1 Water Pollution

Water pollution is the contamination of water bodies (e.g. lakes, rivers, oceans, aquifers and groundwater). Water pollution occurs when pollutants are discharged

directly or indirectly into water bodies without adequate treatment to remove harmful compounds.

**Figure 24.1:** Various Sources of Water pollution

### 24.2.2 Air Pollution

Air contains a mixture of various gases like oxygen, nitrogen, carbon dioxide, argon etc. Air pollution is the introduction into the atmosphere of chemicals, particles, or biological materials that cause discomfort, disease, or death to humans, damage to other living organisms such as food crops, natural environment or built environment.

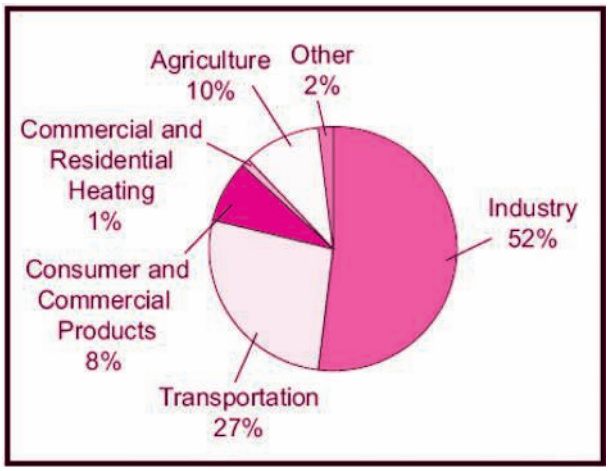


**Figure 24.2:** Percentage Contribution of Air Pollution

The major sources of air pollution are:

- Industrial emissions
- Vehicular emissions
- Domestic emissions

The most common air pollutants in urban areas include Sulphur dioxide ($SO_2$), Nitrogen oxides (NO & $NO_2$), Carbon monoxide (CO), etc. Apart from this, the gases discharged from refrigerators, air conditioners etc. are responsible for depletion of the Ozone layer.

**Figure 24.3:** Smoke coming out of Chimneys

### 24.2.3 Noise Pollution

The word 'noise' originated from the Latin word 'nausea' meaning sea-sickness. 'Noise' is any unwanted sound that disrupts environmental equilibrium. Noise is measured in decibels. A major source of 'noise' is by motor vehicles, aircrafts, fire-crackers, sirens, loud speakers and machinery.

According to a survey conducted by the National Physical Laboratory, Delhi, Mumbai and Kolkata are amongst the noisiest cities in the world. Noise pollution has harmful effects on the environment, humans and animals. Some adverse effects of noise pollution on human health are:

- Hearing loss or hearing impairment;
- Rise in blood pressure;
- Cardio-vascular health effects;
- Increase in stress level; and
- Decrease in efficiency and concentration

Noise pollution is excessively displeasing to humans, animals, or we can say that machine-created environmental noise disrupts the activity or balance of human or animal life. The source of most outdoor noise worldwide is mainly construction and transportation systems, including noise from motor vehicles, noise from aircrafts, and noise from trains and engines. Poor urban planning may give rise to noise pollution, since industrial and residential buildings constructed side-by-side can result in noise pollution in the residential areas.

### 24.2.4 Land Pollution

Deforestation, release of toxic substances on the land, throwing of unhygienic waste on earth, dumping of garbage, biomedical waste etc. causes land pollution. Excessive use of pesticides is also a source of land pollution as this effects the potability of water.

### 24.2.5 Solid Wastes Pollution

Wastes are the materials that are not needed and are economically unusable without further processing. 'Solid wastes' includes agricultural wastes, ashes, bio-medical wastes, body parts of dead animals, dry or wet garbage from domestic activities which may contain plastics, metals, woods, glass, paper, detergents, industrial wastes, mining wastes etc.

### 24.2.6 Food Pollution (Food Adulteration)

All living beings require food to obtain energy from which they carry on their daily activities. If the food consumed is polluted or adulterated it will have injurious effects on the consumer's health. The pollution of food begins by use of chemical fertilizers and various pesticides at different stages of plant growth. These chemicals directly or indirectly affect the quality of food and affects health of the consumer. Food also gets polluted during processing, storage, packaging and transportation.

### 24.2.7 Thermal Pollution

Temperature plays an important role in determining the conditions in which living organisms can survive. Any undesirable, harmful change in natural temperature disturbing the natural heat balance of the surroundings is called 'Thermal Pollution'.

### 24.2.8 Nuclear (Radioactive) Pollution

One of the most important and dangerous types of pollution is 'nuclear pollution'. 'Nuclear pollution' is produced by nuclear explosion which are

carried out for performing nuclear tests and which is further used for making nuclear weapons. Due to these explosions about 15 to 25% of the radioactive particles enter into the atmosphere. Once they enter into the atomsphere they continue to fall on the earth for several years. The best example is the Hiroshima Atomic Bombings.

## ACTIVITY 24.1

Make a list of sources of 'air pollution', 'water pollution' and 'noise pollution':

| Air Pollution | Water Pollution | Noise Pollution |
|---|---|---|
| | | |
| | | |
| | | |
| | | |
| | | |

## INTEXT QUESTIONS 24.2

1. Define the following terms:
   a. Water Pollution
   b. Air Pollution
   c. Noise Pollution
2. Indentify the major sources of Air pollution.
3. Find out some adverse effects of noise pollution on human health.

## 24.3 ENVIRONMENT PROTECTION

Environmental protection is a practice of protecting the natural environment at individual, organizational or governmental levels, for the benefit of the natural environment and humans. Due to the pressures of population and technology, the biophysical environment is being degraded, either partilly or permanently. This has been recognized, and governments have begun placing restraints on activities that cause environmental degradation. Since the 1960's, movements for the protection of environment have created awareness about the various environmental issues. There is no agreement on the extent of environmental impact on human activity, and protection measures are occasionally criticized.

Academic institutions now offer courses such as environmental laws, environmental studies, environmental management and environmental engineering, that teach the history and methods of environment protection. Waste production, air pollution, and loss of biodiversity (resulting from the introduction of invasive species and species extinction) are some of the issues related to environmental protection.

Environmental protection is influenced by three interwoven factors: environmental legislation, ethics and education. Each of this factor plays its part in influencing national-level environmental decisions and personal-level environmental values and behaviors. For environmental protection to become a reality, it is important for societies to develop each of these areas.

## INTEXT QUESTONS 24.3

1. Define the term 'Environmental Protection'.
2. List the factors which influences 'Environmental Protecton'.

## 24.4 NEED FOR PROTECTION OF ENVIRONMENT

The need for protection of environment can eailsy be understood from the following facts:

- One billion people in the world have no clean water
- Two billion people have inadequate facilities of sanitation
- One and a half billion people (mostly in large cities of newly industrialized countries) breathe air that is dangerously unhealthy and so on.

The human beings as well as animals need clean food and water, and in order to have clean food and water, it is necessary to protect the ecosystem that make survival possible. If we do not stop pollution, it is sure that the world will come to an end.

## INTEXT QUESTONS 24.4

**Fill in the Blanks**

1. The human beings need clean food and water for _____.
2. If we do not stop pollutin, it is sure that the world will come to an _____.

Notes

## 24.5 LEGAL MECHANISM IN RELATION TO ENVIRONMENT PROTECTION

'Environmental Law' is an instrument to protect and improve the environment and to control or prevent any act or omission polluting or likely to pollute the environment. An environmental legal system is essentially a set of laws and administrative rules which regulate the relationships and conflicts between all the people concerned with the environment, as well as defining the relationships between people and the environment itself. The Honourable Supreme Court in *K. M. Chinnappa v. Union of India* defined "**Environmental Law**" as an instrument to protect and improve the environment and control or prevent any act or omission polluting or likely to pollute the environment.

In the Constitution of India, it is clearly stated that it is the duty of the State to "protect and improve the environment and to safeguard the forests and wildlife of the country". It imposes a duty on every citizen "to protect and improve the natural environment including forests, lakes, rivers, and wildlife". Reference to the environment has also been made in the Directive Principles of State Policy (Part IV) as well as the Fundamental Rights (Part III). The Department of Environment was established in India in 1980 to ensure a healthy environment for the country. This later became the Ministry of Environment and Forests in 1985.

### 24.5.1 Ministry of Environment and Forests (MoEF)

The Ministry of Environment & Forests (MoEF) is the nodal agency in the administrative structure of the Central Government for planning, promotion, co-ordination and overseeing the implementation of India's environmental and forestry policies and programmes. The primary concerns of the Ministry are implementation of policies and programmes relating to conservation of the country's natural resources including its lakes, rivers, biodiversity, forests and wildlife, ensuring the welfare of animals, and the prevention and abatement of pollution.

The broad objectives of the Ministry are:

- Prevention and control of pollution;
- Protection of the environment; and
- Ensuring the welfare of plants & animals

### 24.5.2 The Constitution of India

The 'Right to Life' contained in Article-21 of the Constitution of India includes the right to clean and human environment. It means you have the right to live in a clean and healthy environment.

Article-38 of our Constitution requires State to ensure a social order for the welfare of people, which can be obtained by an unpolluted and clean environment only.

> Article-48A of the Constitution requires the State to adopt the Protectionist policy as well as Improvinistic Policy. ***Protectionist policy*** imposes ban on those things which lead to environmental degradation, e.g. ban on use of leaded petrol, ban on use of plastic bags etc. ***Improvinistic policy*** refers to alternatives that can be used for improvement of environment, e.g. use of CNG or low sulphur fuel, tree plantation in industrial areas etc.

Article-48A of the Constitution declares "The State shall endeavour to protect and improve the environment and safeguard forests and wildlife of the country."

Article-51A(g) of the Indian Constitution says: "It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures."

### 24.5.3 The Water (Prevention and Control of Pollution) Act, 1974

The Water (Prevention and Control of Pollution) Act was enacted in 1974 to provide for the prevention and control of water pollution, and for maintaining or restoring of wholesomeness of water in the country.

This is the first law passed in India whose objective was to ensure that the domestic and industrial pollutants are not discharged into rivers, and lakes without adequate treatment. The reason is that such a discharge renders the water unsuitable as a source of drinking water as well as for the purposes of irrigation and support marine life.

In order to achieve its objectives, the Pollution Control Boards at Central and State levels were created to establish and enforce standards for factories discharging pollutants into water bodies.

### 24.5.4 The Air (Prevention and Control of Pollution) Act, 1981

The Air (Prevention and Control of Pollution) Act, 1981 was enacted to provide for the prevention, control and abatement of air pollution in India. It is a specialised piece of legislation which was enacted to take appropriate steps for the preservation of natural resources of the earth, which among other things include the preservation of the quality of air and control of air pollution.

The prime objectives of the Act are the following:

- Prevention, control and abatement of air pollution;
- Establishment of central and state pollution control boards to implement the aforesaid purpose; and
- To maintain the quality of air.

### 24.5.5 The Environment Protection Act, 1986

It was the ***Bhopal Gas Tragedy*** which necessitated the Government of India to enact a comprehensive environmental legislation, including rules relating to storing, handling and use of hazardous waste. On the basis of these rules, the Indian Parliament enacted the Environment Protection Act, 1986. This is an umbrella legislation that consolidated the provisions of the Water (Prevention and Control of Pollution) Act of 1974 and the Air (Prevention and Control of Pollution) Act of 1981. Within this framework of the legislations, the government established Pollution Control Boards (PCBs) in order to prevent, control, and abate environmental pollution.

The objective of the Environment Protection Act is to protect and improve the environment in the country.

**BHOPAL DISASTER**

The Bhopal disaster, also referred to as the Bhopal Gas Tragedy, was a gas leak incident in India, considered one of the world's worst industrial disasters. It occurred on the night between 2nd and 3rd December, 1984 at the Union Carbide India Limited (UCIL) pesticide plant in Bhopal, Madhya Pradesh. Over 500,000 people were exposed to methyl isocyanate gas and other chemicals. The toxic substance made its way in and around the shanty-towns located near the plant. Estimates vary on the death toll. The official immediate death toll was 2,259. The government of Madhya Pradesh confirmed a total of 3,787 deaths related to the gas release. According to other estimates, around 8,000 died within two weeks and another 8,000 or more have since died from gas-related diseases. A government affidavit in 2006 stated the leak caused 558,125 injuries including 38,478 partial disabling injuries and approximately 3,900 severe and permanent disabling injuries.

### 24.5.6 The Noise Pollution (Regulation and Control) Rules, 2000

There was no direct provision for 'noise pollution' under the Environment Protection Act, 1986 or any other legislation. The increasing ambient noise levels in public places from various sources like industrial activity, generator sets, loud speakers, vehicular horns etc. have harmful effects on human health. It was the need of the hour to come with a law which would regulate and control noise producing sounds with the objective of maintaining the ambient air quality standards in respect of noise. Therefore, the Central Government framed 'The Noise Pollution (Regulation and Control) Rules, 2000'.

These rules have been laid down by the government to reduce environmental noise pollution. Certain standards, such as the ambient air quality standards, have been set by the government. The permissible levels of noise are different for

different areas, such as industrial, commercial, residential areas and silence zones (area within the vicinity of hospitals, educational institutions or courts).

### 24.5.7 The Public Liability Insurance Act, 1981

This Act aims to provide immediate relief to the persons affected by accident occurring while handling any hazardous substance. It provides that every owner shall take out, before he starts handling any hazardous substance, one or more insurance policies providing for contracts of insurance. The objective of taking insurance is that the compensation resulting from the possible future accident is guaranteed.

The collector of the area has been empowered to verify the occurrence of any accident at any place within his jurisdiction and also cause publicity to be given for inviting applications from the victims for any compensation.

Apart from the insurance contract, the funding for the purpose of compensation is also generated by the Central Government by the establishment of "Environment Relief Fund." This fund may be utilized by the collector for paying the compensation.

### 24.5.8 The National Environment Tribunal Act, 1995

This Act is aimed to provide for strict liability for damages arising out of any accident occurring while handling any hazardous substance and for the establishment of a National Environment Tribunal for effective and expendition disposal of cases arising from such accident, with a view to giving relief and compensation for damages to persons, property and the environment and for matters connected with it.

The beauty of this Act lies in the fact that the liability of the owner of hazardous substance has been made strict in case of any accident and the resultant injury to public. In any claim for the compensation, the claimant is not required to plead and establish that the death, injury or damage in respect of which the claim has been made was due to any wrongful act, neglect or default of any person. So, the burden of proof does not rest upon the claimant of compensation which is a big relief for the victims.

### 24.5.9 The National Environment Appellate Authority (NEAA) Act, 1997

The National Environment Appellate Authority (NEAA) was set up by the Ministry of Environment and Forests to address cases in which environment clearance is required in certain restricted areas. It was established by the National Environment Appellate Authority Act 1997 to hear appeals with respect to restriction of areas in which any industries, operations, processes or class of industries, operations or processes shall or shall not be carried out, subject to certain safeguards under the Environment Protection Act, 1986.

### 24.5.10 The Ozone Depleting Substances (Regulation and Control) Rules, 2000

The Ozone Depleting Substances (Regulation and Control) Rules have been laid down for the regulation of production and consumption of ozone depleting substances. The main objective of this rule is protection of the Ozone layer. The rule restricts unauthorized sale, purchase, import, export and use of ozone depleting substance.

> 'Ozone Depleting Substances' (ODS) are the products which lead to the depletion of ozone layer. CFC (CHLOROFLUOROCARBON) is an example of ODS.

## INTEXT QUESTIONS 24.5

Write True/False.

1. The Ministry of environment and Forests (MOEF) is the nodal agency for planning, promotion, cooperations and overseeing the implementation of India's environmental and forestry policies and programmes. (True/False)
2. The Water (Prevention and Control of Pollution) Act, 1974 was enacted to provide for the prevention and control of water pollution. (True/False)
3. The Air (Prevention and Control of Pollution) Act, 1981 was enacted to provide for the prevention, control and abatement of air pollution in India. (True/False)
4. The objective of the Environment Protection Act, 1986 is to protect and improve the environment in the country. (True/False)
5. The Noise Pollution (Regulation and Control) Rules, 2000 lays down rules to reduce environmental noise pollution. (True/False)
6. The Public Liability Insurance Act, 1981 aims to provide immediate, relief to the persons affected by accident occurring while handling any hazardous substance. (True/False)
7. The main objective of the 'Ozone Depleting Substances (Regulation and Control) (ODS) Rules, 2000' is protection of ozone layer. (True/False)

## 24.6 POLLUTION CONTROL BOARD

The Pollution Control Boards are statutory bodies constituted with an objective to protect and promote the atmosphere and to control pollution.

### 24.6.1 The Central Pollution Control Board

The Central Pollution Control Board (CPCB) a statutory organisation, was constituted in September, 1974 under the Water (Prevention and Control of Pollution) Act, 1974 to deal with the rise in pollution. Further, CPCB was

entrusted with the powers and functions under the Air (Prevention and Control of Pollution) Act, 1981.

Principal functions of the CPCB:

(i) to promote cleanliness of streams and wells in different areas of the States by prevention, control and abatement of water pollution, and

(ii) to improve the quality of air and to prevent, control or abate air pollution in the country.

### Other Functions of the Central Board

- Advise the Central Government on any matter concerning prevention and control of water and air pollution and improvement of the quality of air.
- Plan and cause to be executed a nation-wide programme for the prevention, control or abatement of water and air pollution.
- Provide technical assistance and guidance to the State Boards, carry out and sponsor investigation and research relating to problems of water and air pollution, and for their prevention, control or abatement.
- Prepare manuals, codes and guidelines relating to treatment and disposal of sewage and trade effluents as well as for stack gas cleaning devices, stacks and ducts.
- Lay down or modify (in consultation of the State Governments), the standards for streams or wells and lay down standards for the quality of air.

## 24.6.2 The State Pollution Control Boards

The State Governments also have their Pollution Control Boards for example, UPPCB (Uttar Pradesh Pollution Control Board), DPCC (Delhi Pollution Control Board), HPCB (Haryana State Pollution Control Board), RPCB (Rajasthan Pollution Control Board), etc.

### Functions of State Boards

- To advise the State Government on matter relating to pollution and on 'siting' of industries;
- To plan programmes for pollution control;
- To collect and disseminate information;
- To carry out inspection of polluting industries and areas;
- To lay down effluent and emission standards; and
- To issue consent to industries and other activities for compliance of prescribed emission and effluent standards

## INTEXT QUESTIONS 24.6

1. Describe two main functions of Central Pollution Control Board.
2. List any two functions of State Pollution Control Board.

## WHAT YOU HAVE LEARNT

The environment is a place or surrounding where we live and to keep it clean is an essential requirement for the survival of human beings. Pollution is an unfavourable alteration of a surrounding. It is the addition of any foreign material to air, water or soil. Urbanisation, industrialisation, over-population, over-exploitation of resources are some of the factors which have contributed to environmental deterioration.

Pollution is categorized in the following areas: Water pollution; Air pollution; Noise pollution; Land pollution; Solid Water pollution; Food pollution; Thermal pollution; Nuclear pollution

Every human being or animal requires food, clean water and clean air to make its survival possible. The various legislations, rules with respect to the protection and promotion of environment are:

a. The Water (Prevention and Control of Pollution) Act, 1974;

b. The Air (Prevention and Control of Pollution) Act, 1981;

c. The Environment Protection Act, 1986;

d. The National Environmental Act, 1995;

e. The Noise Pollution (Regulation and Control) Rules, 2000;

f. The Public Liability INsurance Act, 1981;

g. The National Environment Appellate Authority (NEAA), 1997; and

h. The Ozone Depleting Substances (Regulation and Control) Rules, 2000.

The Central Pollution Control Boards are constituted under the Water (Prevention and Control of Pollution) Act, 1974, to deal with rise in pollution.

## TERMINAL EXERCISES

1. Define the term 'Environmental Pollution'.
2. Explain the following terms
   (a) Air Pollution
   (b) Water Pollution
   (c) Noise Pollution

3. Environment Protection Act is an umbrella legislation that consolidated the provisions of the Water (Prevention and Control of Pollution) Act of 1974 and the Air (Prevention and Control of Pollution) Act of 1981. Explain.
4. Describe the main functions of Central & State Pollution Control Boards.
5. Visit the river Yamuna, observe the activities going on there. Check the pollution causing activities. Write a report in five hundered words on the causes of pollution of Yamuna and the measures required to check it.
6. The levels of air-pollution are very high in Delhi these days. Taking help from the lesson, check out the causes of air pollution and the remedial measures to check further pollution. Write a report of about five hundered words.
7. Visit five major government hospitals of Delhi and collect data on the number of patients who come to the OPD with complaints of respiratory problems caused due to air pollution. Write your report in five hundered words referring to the relevant promises of law.
8. Assuming you are living in a residential area which also has two hospitals. The city airport which is located close to your colony works for 24 hours with flights landing and taking off. Incidentally, the colony already existed, but the airport authorities have started using a newly constructed runway recently. The day somehow passes off but at might, the deafening sound of landing and taking-off of aeroplanes traumatises the in-patients and contribute to them increasing stress levels which can be dangerous at times.
9. Draft a letter to the concerned authority stating the problem of these patients while referring to the applicable laws on noise pollution. Request them to close the airport atleast at night to give some respite to the patients in the hospitals.

## ANSWER TO INTEXT QUESTIONS

### 24.1

1. 'Environment' is the sum total of water, air and land and the interrelationships that exist among them with human beings, other living organisms and materials.
2. "Environment" is a difficult word to define. Its normal meaning relates to the surroundings, but obviously that is a concept which is relatable to whatever object which is surrounded. Environment is a polycentric and multi-faceted problem affecting human existence.

## 24.2

1. (a) 'Water pollution' is the contamination of water bodies (e. g. Lakes, rivers, oceans, aquifers and ground water).

   (b) 'Air Pollution' is the introduction into atmosphere of chemicals particals, or biological materials that cause discomfort, disease, or death to humans, damage to other living organisms such as good crops, natural environment, of built environment.

   (c) Noise Pollution is any unwanted sound that disrupts environmental equilibrium and has harmful effects on environment, humans and animals

2. Industrial emissions; Vehicular emissions; and Domestic emissions
3. (a) Hearing loss or hearing impairment;

   (b) Rise in blood pressure;

   (c) Increase in stress level;

   (d) Cardio–vascular health effects and

   (e) Decrease in efficiency and concentration

## 24.3.

1. Environmental protection is a practice of protecting the natural environment at individual organization or governmental levels, for the benefit of natural environment and humans.
2. Environmental protection is influenced by three interwoven factors : environmental, legislation, ethics and education.

## 24.4.

1. Survival
2. End

## 24.5.

1. True
2. True
3. True
4. True
5. True

6. True
7. True

## 24.6.

1. The two main functions of Central Pollution Control Board are: (i) to promote cleanliness of streams and wells is different areas of the states by prevention, control and abatement of water pollution; and (ii) to improve the quality of air and to prevent, control or abate air pollution in the country.
2. The two main functions of State Pollution Boards are : (i) to advise the state government an matters relating to pollution and on siting of industring; and (ii) to plan programmes for pollution control.

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# SUSTAINABLE DEVELOPMENT

Today there is a serious concern about the earth's growing fragility. The earth's increasing population is perceived as a threat. Man with his thoughtless acts has had an adverse effect on the earth's ecological system. As global citizens we have to recognise that our actions have consequences for the entire world. Economic development cannot be viewed in isolation from social and ecological development. We have to ensure that the path of development that we follow ensures the welfare of the earth's ecology and that of its inhabitants. This is only possible if there is cooperation amongst the nations of the world.

'Sustainable Development' is concerned with the rate of consumption and use of natural resources. The focus is on ensuring that we do not consume the resources at a rate that makes it difficult for us to substitute or replace them. If we use cars then we have to make sure that we use eco-friendly fuel and technology that minimises air pollution. If we use ground water then we also have a responsibility of recharging it through various techniques like rain water harvesting.

'Sustainable Development' is thus, responsible development. It is economic development that keeps in mind the needs of the society and environment. It is development that is inclusive development that reaches all sections of society. It is development that benefits all sections of society and is not at the cost of the earth's ecology.

## OBJECTIVES

After completing the lesson you will be able to:

- state the meaning of 'Sustainable Development';
- appreciate the importance and need for 'Sustainable Development';
- comprehend the evolution of 'Sustainable Development' at the National and International levels;
- identify the laws on 'Sustainable Development' in India; and
- appreciate the role of the judiciary in ensuring Sustainable Development

# 25.1 CONCEPT AND MEANING OF SUSTAINABLE DEVELOPMENT

## 25.1.1 What is Sustainable Development?

In 1987, the United Nations released the Brundtland Report, which included what is now one of the most widely recognised definitions: "Sustainable Development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs (from the World Commission on Environment and Development's (the Brundtland Commission) Report 'Our Common Future'.

According to the same Report, the above definition contains within it two key concepts:

- the concept of 'needs', in particular the essential needs of the world's poor; and
- the idea of limitations imposed by the state on technology and social organization on the environment's ability to meet present and future needs

This means we have to meet the needs of all sections of society particularly the underprivileged. While meeting the needs we have to make sure that what we take from nature does not increase the degradation of the earth's natural resources and threatens biodiversity. Nature is finite and we need to set a limit to our consumption of natural resources. There is a need for a strategic approach to maintaining a balance between social, economic and environmental challenges.

Sustainability recognises an integrated view of the world that links a community's economy, environment and society. This recognises the fact that an economy exists within the society which in turn exists within the environment of the earth's ecosystem. The view emphasises the fact that humans are a part of nature.

Figure 1 illustrates the relationship between Sustainable Development and Society, Economy and Environment.

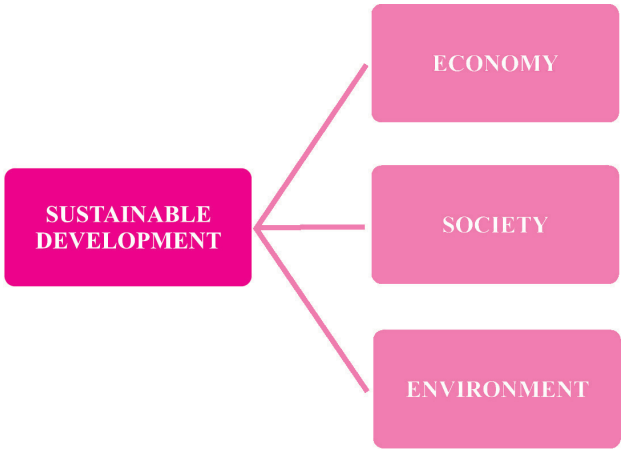


**Figure 25.1:** Relationship between Sustainable Development, Society, Economy and Environment

### What leads to unsustainability?

Let us try and understand the threats to 'Sustainable Development'.

Economic disparity, social inequality and environmental degradation are threats to sustainability.

Some of the causes of unsustainability are as follows:

- increasing human population;
- over exploitation of resources to meet human needs like fuel, fodder and shelter;
- activities like fishing, agriculture, overuse of fresh water, deforestation and industrialisation;
- land clearing leads to problems like soil degradation, pollution, loss of biodiversity, deforestation, desertification, climate change; and
- social degradation due to factors like increasing unemployment, health crisis, armed conflict, urbanisation, poverty, income inequity

## INTEXT QUESTIONS 25.1.1

1. Define 'Sustainable Development'
2. What are the threats to Sustainable Development?

### 25.1.2 What are the components of Sustainable Development?

The various components of sustainability can be included under three headings– economy, society and environment. In order to attain 'Sustainable Development' the government has to ensure that there are institutional mechanismsin place to achieve sustainable development in all three areas. These institutional mechanisms make certain that there is a sustained, organised and coordinated effort at all levels to bring about socio economic development and environmental sustainability. These include the various ministries and departments at the central as well as state level.

The diagrams in the following sections broadly illustrate the various parts of the economy, society and environment that are targeted for sustainable development.

Figure 2 shows the broad components of the economy. Figure 3 shows the broad components of society and Figure 4 shows the broad components of the environment.

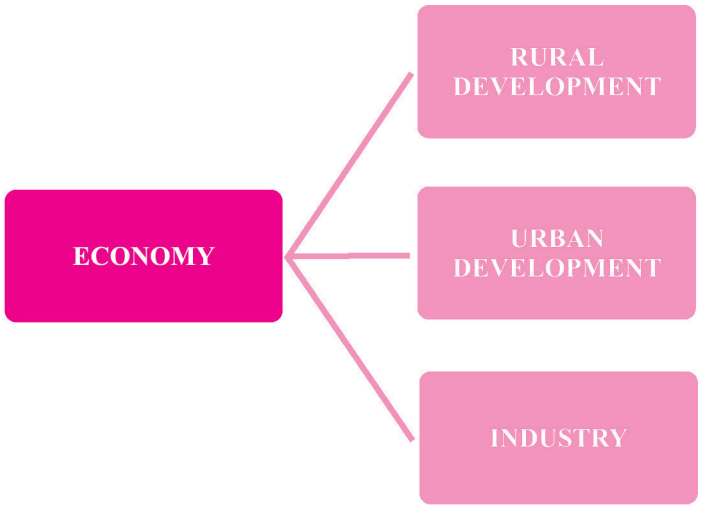


**Figure 25.2:** Some Targeted areas of Sustainable Development for the Economy

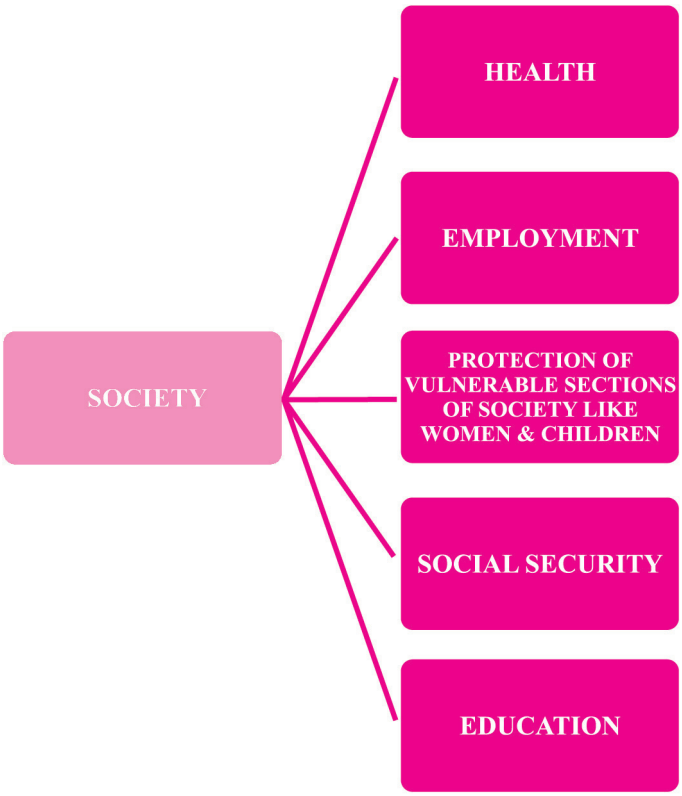


**Figure 25.3:** Some Targeted areas of Sustainable development in Society

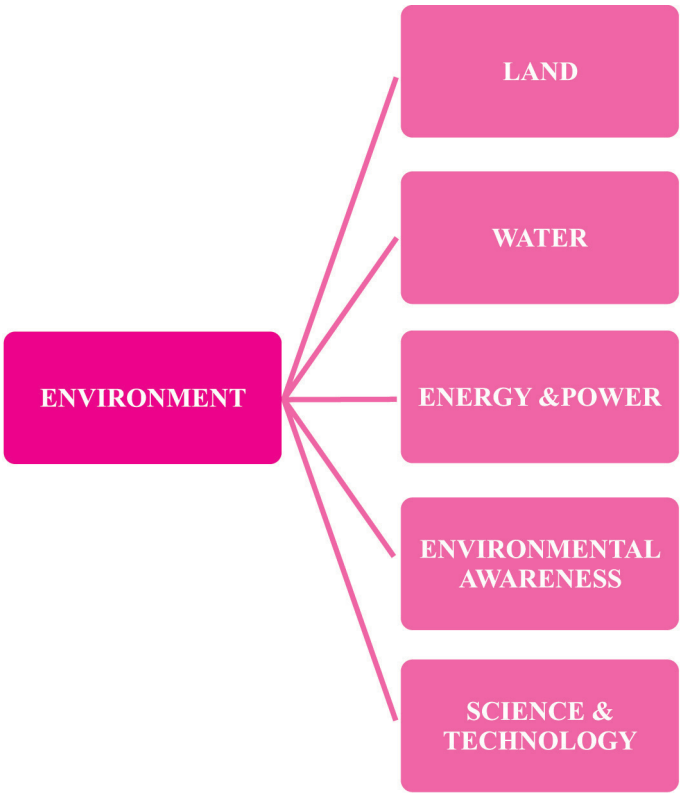


**Figure 25.4:** Some Targeted Areas of Environmental Sustainability

## INTEXT QUESTIONS 25.1.2

1. What are the components of 'Sustainable Development'?
2. Can you tell the name of some targeted areas for 'Sustainable Development' in the economy?
3. Which Ministry looks after the health of the people?
4. Give an example of how environmental degradation can be reduced?

## 25.2 ORIGIN AND DEVELOPMENT (STOCKHOLM TO RIO)

### 25.2.1 Stockholm Declaration, 1972

Global inter-governmental action began with the United Nations Conference on the Human Environment in Stockholm in 1972. This led to the 'Stockholm Declaration' and an action plan with over 100 recommendations on environmental assessment, management, and support measures.The Stockholm slogan was "Only One Earth". The environmental debate centred around the Club of Rome Report on the "Limits to Growth", and talk of economic development (the

precursor of Sustainable Development).The Report highlights the consequences of unrestrained growth and the linkages between several global problems.

## Brundtland Commission 1983

Post Stockholm concerns for the environment continued to grow. There was widespread deforestation, industrial pollution and environmental degradation. The ozone hole, the warming of the earth, increased carbon dioxide in the environment all added to the growing environmental concerns.

A need was felt to link environmental concerns with industrial development and growth. With this in mind, the United Nations, in 1983, established the "World Commission on the Environment and Development" or as it is commonly referred to as the "Brundtland Commission". The Brundtland Commission Report – *'Our Common Future'* in 1987 defined 'Sustainable Development'. As we have discussed in the earlier sections -"development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

## Rio Declaration 1992- Agenda 21

Twenty years after Stockholm, the United Nations Conference on Environment and Development was held in Rio de Janeiro in 1992. 'The Earth Summit', as it was called adopted the 'Rio Declaration' and an action plan of 40 chapters called Agenda 21 was adopted by over 100 Nations.

Agenda 21 was geared towards achieving Sustainable Development in the 21$^{st}$ century. The 'Rio Concept' can be summarised as:

- Equal consideration of environment, society and economy;
- Intergenerational solidarity keeping in mind the needs of the future generations;
- A global consensus and political commitment at the national and international levels;
- Involvement of the Non-GovernmentOrganisations (NGOs);
- Provides a blueprint for the governments to attain a balance between the environment and the needs of the population; and
- A Commission on Sustainable Development (CSD) was established to follow up the Rio agreements, and it monitors the agreements of the Earth Summit at the local, national, regional and international levels

## The Rio Summit Follow up

The Rio Summit was followed by several other Conferences to focus on 'Sustainable Development'. These include conferences like the "Global Conference

on Sustainable Development of Small Island Developing States" in Barbados in 1994: "The World Summit on Social Development" in Copenhagen in 1995: "The Fourth World Conference on Women", Beijing 1995; and the "Second UN Conference on Human Settlements, Habitat II", Istatbul in 1996.

The focus was on following the path of 'Sustainable Development' in all countries in all parts of the ecosystem whether on land, water or air. The effort has also been an all-inclusive development that reaches all sections of the population with a special focus on the vulnerable sections like women, children or the marginalised.

A five year review of the progress of the 'Earth Summit' was held in **1997** by the United Nations General Assembly. This was followed by a ten year review in **2002** by the World Summit on Sustainable Development (WSSD). The WSSD was held in **Johannesburg, South Africa**. It urged the Nations to make progress in the formulation and implementation of strategies for sustainable development and to begin implementing them by 2005.

## IN TEXT QUESTIONS 25.2.1

1. What was the main theme of Stockholm Declaration?
2. Why was the Commission on Sustainable Development (CSD) established?
3. What does WSSD stand for and what is its agenda?

### 25.2.2 Millennium Development Goals

In 2000, the largest-ever gathering of world leaders agreed to a set of time-bound and measurable goals for combating poverty, hunger, disease, illiteracy, environmental degradation and discrimination against women, to be achieved by 2015. These are called the ‚Millennium Development Goals,.

The following is a brief overview of some significant decisions and agreements that were reached by the various countries:

In 2004, **Delhi Mandates** the use of compressed natural gas in city buses and auto rickshaws, responding to rising civil society pressure over air pollution.

In 2005, **Kyoto Protocol** enters into agreement which legally bound the developed countries to go for greenhouse gas emission reductions, and establishing the Clean Development Mechanism for developing countries.

In 2007, **Montreal Protocol** was signed on Substances that deplete the 'Ozone Layer'. Countries agreed to an accelerated phase-out schedule for hydro-chlorofluorocarbons (HCFCs). NASA has reported that the 'ozone layer' is

recovering, in part due to reduced concentrations of CFCs, phased out under the '**Montreal Protocol**'.

In 2008, **Green Economy** ideas enter the mainstream. National Governments allocate more funds to further stimulate environmental actions and green growth becomes the new objectives for the future economy. Also in 2008,scientist's document says that the oceans are growing more acidic due to increasing levels of atmospheric carbon dioxide. This they predict, would have disastrous consequences for the earth's ecosystem.

In 2009, **Copenhagen** climate negotiations were held. However, the participating countries failed to reach an agreement on new emissions reductions commitments beyond 2012 (the end of the 'Kyoto Protocol' time frame). An important outcome was that thrust now shifted towards national and regional efforts to reduce emissions.

In 2009,the **G20 Pittsburgh Summit** was held. Leaders called for making fossil fuel like petrol and diesel more expensive in order to phase them out. They also agreed to provide a targeted support for the poorest people.

In 2011,climate change negotiations were held in **Durban**. The negotiations' outcome was a step forward in establishing an international agreement beyond Kyoto. It was agreed to cut carbon emissions in all countries, including developed countries and several major developing countries.

In 2012, one of the first of the Millennium Development Goal targets is achieved, in advance of the 2015 deadline. The percentage of the world's people without access to safe drinking water is cut in half.

The 2012 **United Nations Climate Change Conference was held in Doha**. It was agreed to extend the 'Kyoto Protocol' that was to end in 2012 to 2020. It was also agreed to renegotiate the agreement reached in Durban by 2015 and to implement it by 2020.

From the 'Stockholm Declaration' of 1972 to the latest Conference held in Doha in 2012, more than forty years have passed. We are actively involved in greening the planet and in developing clean energy solutions. The world as a whole is committed towards combating hunger, disease, illiteracy, poverty, reducing inequalities and so on. The target is to ensure that the benefits of development accrue to all sections of society and not at the cost of the future generations.

## INTEXT QUESTIONS 25.2.2

1. What does the term 'Millennium Development Goals' mean?
2. What is the 'Kyoto Protocol'?

3. Under which Protocol did countries agree to phase out hydro-chlorofluorocarbons (HCFCs)?
4. Where and when did various countries agree to extend the 'Kyoto Protocol' that was to end in 2012 to 2020?

## 25.3 NEED FOR SUSTAINABLE DEVELOPMENT

The world as a whole is steadfast in its commitment towards achieving a balance between the environmental, economic and social development. The agenda of 'Sustainable Development' is also an all-inclusive growth. That means a pattern of development that involves all sections of the community – the well off, the poor, men and women. Such a pattern of growth is based on the need to preserve the diversity of the eco-system. Sustainable Development involves:

- Preservation of biological diversity in terrestrial, freshwater and marine systems;
- Sustainable use of resources and minimising the depletion of resources;
- Caring for the environment;
- Improving the quality of life including social and economic concerns;
- Conservation of natural capital **both** for renewable and non- renewable resources;
- Conservation of natural and cultural diversity;
- Limits on natural resource utilisation and assimilation of wastes;
- Efficiency of resource utilisation by all societies;
- Social equity through poverty reduction and gender equity;
- Reduction of emission of greenhouse gases;
- Reduction in use of ozone depleting substances;
- Reduction in air pollution;
- Reduction in use of chemical fertilisers;
- Stopping desertification; and
- Stopping deforestation

### INTEXT QUESTIONS 25.3

1. What is the need for 'Sustainable Development'? List any two factors that are important for attaining 'Sustainable Development'.
2. What is the Agenda of 'Sustainable Development'.

## 25.4 SUSTAINABLE DEVELOPMENT IN INDIAN LAW

Post Stockholm and post Rio, Nations across the world have adopted a number of laws pertaining to the three pillars of sustainable development. India too has implemented a plethora of laws. However, as far as the implementation of the laws is concerned the State often falters in the implementation of laws. The Supreme Court of India has upheld in a number of instances that the Indian law is bound by international treaties and conventions of which India is a signatory.

The judiciary in India has often taken the lead in implementing the laws. Indian laws on Sustainable Development can broadly be seen to have developed in four distinct but overlapping phases. These are as follows:

### 25.4.1 First Phase (1972-1983)

The focus in this phase was to protect the environment. This phase came largely in the wake of the Stockholm Conference of 1972 which required all signatories to adopt measures to protect the environment. The highlights were the constitutional amendments and the enactment of legislations to protect the wildlife and to arrest water and air pollution.

There are certain important constitutional provisions which give the citizens the right to approach the High Courts as well as the Supreme Court of India to protect their fundamental rights. **Article 226** of the Constitution gives the right to citizens to approach the High Court to enforce their fundamental rights and the High Courts are given the power to issue various writs. **Article 32** of the Indian Constitution could be invoked by the citizens for enforcement of the Fundamental Rights. **Article 21** of the Constitution guarantees one of the important Fundamental Right to the citizens and says that no person shall be deprived of his life and personal liberty, except according to procedure established by law. This "right to life" contained in Article 21 has been given a very wide interpretation by the Supreme Court of India. **Article 48-A,** which is one of the Directive Principles of State Policy, states that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

India implemented the **42$^{nd}$ amendment to the Constitution** in 1976.Through this amendment **Article 48-A** was implemented through which protection and promotion of the environment, forests and wildlife became a part of the Directive Principles of State Policy. Through **Article 51A (g)** protection of the environment was made a fundamental duty of all citizens.

In addition, several Acts pertaining to the environment were formulated namely the Wildlife (Protection) Act of 1972,the Water (Prevention andControl of

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Pollution) Act of 1974, the Forest Conservation Act of 1980 and the Air (Prevention and Control of Pollution) Act of 1981.

### 25.4.2 The Second Phase (1984-1997)

The focus in this phase was on ensuring social equity and justice. In response to the '**Bhopal Gas Disaster**' in 1984, there was a growth in 'judicial activism' which led to a reinterpretation of existing laws and legislations.

The **Air (Prevention and Control of Pollution) Act of 1981** underwent a major modification in 1987. In 1991 the **Public Liability Insurance Act**, was enacted to provide for immediate relief to persons affected by accidents from handling of notified hazardous substance, on a '**no fault basis**'. Under this Act it is mandatory for all industries handling hazardous material to take Public Liability Insurance cover for immediate relief to victims or damage to property.

In response to the 'Rio Declaration' that called upon Nations to develop laws regarding liabilities and compensation to victims of pollution and other environmental damages two Acts were formulated the National Environment Tribunal Act, 1995 (Repealed) and the National Environment Appellate Authority Act. These have been subsequently repealed and replaced by the new **National Green Tribunal Act of 2010**.

The **Environment (Protection) Act (EPA) was enacted in 1986**. The scope of this Act is very wide and it operates on the principle of arresting pollution at the source, polluter pays and also focusses on involvement of the public in decision making. Under the EPA, Environmental Impact Assessment (EIA) Notification was introduced in 1994, it was modified in 2006 and the latest amendment was in 2009. Under the EIA it has become mandatory to seek environmental clearance for several activities and industries with the involvement of the public as per procedure. Significantly after 'Rio' many of these environmental principles have been accepted as a part of Article 21 (Right to Life).

Other legislations that have been introduced for the protection of the environment and prevention of pollution are the Motor Vehicles Act, 1988, to control air pollution due to vehicles.

## INTEXT QUESTIONS 25.4.1 AND 25.4.2

1. What was the focus in the First phase on Environmental Law in India?
2. Point out the importance of Article 51-A (g)?
3. When did the 'Bhopal Gas Tragedy' occur?
4. What was the response of the Indian law makers to the 'Rio Declaration'?

### 25.4.3 Third Phase (1998-2004)

The third phase coincides with India's membership of the WTO in 1998. The focus is on combining economic development with social and environmental issues. Legislations and amendments to the existing legislations have been done to achieve compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) keeping in mind the principles of the 'Convention on Biological Diversity' (CBD).

The **Biological Diversity Act 2002** was framed keeping in mind the principles of CBD. The legislations are directed towards ensuring the sovereign rights of countries over their genetic and biological resources and the acceptance of the need to share benefits flowing from the commercial utilization of biological resources with holders of indigenous knowledge.

The **Patents (Amendment) Act of 2005** has a provision to prevent misappropriation of indigenous knowledge of communities by making it non-patentable. The **Geographical Indications of Goods (Registration and Protection) Act, 1999** facilitates protection of the collective rights of the rural and indigenous communitiesin their unique products.

In this phase under the EPA several secondary legislations dealing with waste management and recycling of substances like plastics were also formulated. These include:

- Municipal Solid Wastes (Management and Handling) Rules, 2000;
- Recycled Plastics Manufacture and Usage Rules,1999;
- Manufacture, Storage and Import of Hazardous Chemical (Amendment) Rules, 2000;
- Batteries (Management and Handling) Rules, 2001;
- Ozone Depleting Substances (Regulation and Control) Rules,2000;
- A series of notifications delegating power to State, River Conservation Authorities to deal with water pollution; and
- The Noise Pollution (Regulation and Control) Rules, 2000

The emphasis in this phase was also on energy conservation and use of renewable sources of energy. Consequently the **Energy Conservation Act, 2001** was enacted, which also set up the Bureau of Energy Efficiency. The **Electricity Act of 2003** has tried to ensure better development in the power sector and also emphasise the use of renewable energy.

Under the orders of the Supreme Court, **Compensatory Afforestation Management and Planning Agency (CAMPA), was set up in 2004**, to compensate for deforestation for development work through afforestation.

### 25.4.4 Fourth Phase (2005 and beyond)

This phase is marked by a proactive rights based approach. A rights based approach is one in which the focus is on ensuring the rights of all sections of community particularly the marginalised. These include legislations like the Human Rights Act 1993 with Amendment Act, 2006; The Right of Children to Free and Compulsory Education Act, 2009 and Commission for the Protection of Child Rights Act, 2005; Maintenance and Welfare of Parents and Senior Citizens Act, 2007; People with Disabilities Act, 1995.

For instance the rights of the traditional forest dwellers have been codified in the Forest Rights Act, 2006. The Act seeks to reconcile the needs of the forest dwellers with the need to conserve wildlife and forests. The Wildlife (Protection) Act of 1972 was amended in, 2002 and it seeks to provide for participatory management of the buffers around the National Parks and Sanctuaries and introduces the concept of 'Community Reserves'.

This phase also continued to focus on the environment through the Environment Impact Assessment

Notification of 2006 and the Hazardous was notified Wastes (Management, Handling and Transboundary Movement)Rules, 2008. In 2011, the E-Waste (Management and Handling)Rules, for environmentally sound practices for management of electronic waste were notified.

The National Green Tribunal Act of 2010 seeks to give effect to the promise made at Rio and to provide for the effective and expeditious disposal of cases related to environmental protection, forests and natural resourcesand provide relief and compensation for damages. The Judiciary in India has had to take on the role of the interpretation and implementation of the law through public interest litigations.

Indian Judiciary in general have relied on the public trust doctrine, precautionary principle, polluter pays principle, the doctrine of strict and absolute liability, the exemplary damages principle, the pollution fine principle and inter-generational equity principle apart from the existing law of the land.

## INTEXT QUESTIONS 25.4.3 AND 25.4.4

1. What is the focus of the Indian Laws in the Third Phase?
2. Explain the main purpose or object of Biological Diversity Act, 2002.
3. Under which Act can we prevent misappropriation of indigenous knowledge of communities?
4. What does the term 'Rights Based Approach' mean?

## WHAT YOU HAVE LEARNT

'Sustainable Development' is concerned with the rate of consumption and use of natural resources. The focus is on ensuring that we do not consume the resources at a rate that makes it difficult for us to substitute or replace them.

Sustainability recognises an integrated view of the world that links a community's economy, environment and society. This recognises the fact that an economy exists within the society which in turn exists within the environment of the earth's ecosystem.

The genesis of 'Sustainable Development' began with the United Nation Conference on 'Human Environment' Stockholm in 1972 and continued upto Doha in 2012.

The laws on Sustainable Development evolved in 1972 onwards in Four Phases. First phase 1972-1983, Second phase 1984-1997, Third Phase 1998-2007, Fourth Phase 2005 and beyond.

The importance of structured institutions like the various Ministries and departments in attaining sustainability can not be denied.

The role of Judiciary in India in environmental protection and in ensuring the complianance of Environmental Law by the Government, State Governments and other concerned Agencies has, no doubt, been quite appreciable.

## TERMINAL EXERCISES

1. Explain the concept of 'Sustainable Development'.
2. What is the 'Brundtland Report'? How does it define sustainability?
3. Describe 'Sustainable Development' through examples highlighting the three components of sustainability.
4. Identify the causes of 'Unsustainability'?
5. Why do we need 'Sustainable Development'?
6. What is the importance of institutional mechanisms in achieving 'Sustainability'? Explain with the help of an example.
7. Discuss the importance of the 'Stockholm Declaration' highlighting its main features?
8. Enumerate the main features of the 'Rio Declaration- Agenda 21'.
9. Discuss the significance of the 'World Summit on Sustainable Development (WSSD)'.

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10. Discuss the important features of the First Phase of Indian environmental laws.
11. Show the impact of the 'Bhopal Gas Tragedy' on the formation of laws on the environment enacted in the second phase from 1984- 1997.
12. What are the significant features of the Third and Fourth Phases of Indian Environmental Laws?

## ANSWERS TO INTEXT QUESTIONS

### 25.1.1

1. 'Sustainable Development' is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

   'Sustainable Development' is concerned with the rate of consumption and use of natural resources. The focus is on ensuring that we do not consume the resources at a rate that makes it difficult for us to substitute or replace them.

2. Threats to sustainability are:
   i. increasing human population;
   ii. over exploitation of resources to meet human needs like fuel, fodder and shelter;
   iii. activities like fishing, agriculture, overuse of fresh water, deforestation and industrialisation;
   iv. land clearing leads to problems like soil degradation, pollution, loss of biodiversity, deforestation, desertification, climate change; and
   v. social degradation due to factors like increasing unemployment, health crisis, armed conflict, urbanisation, poverty, income inequity

### 25.1.2

1. The components of sustainability are economy, environment and society.
2. Some of the targeted areas for economic development are Rural Development, Urban Development and Industry.
3. The Ministry of Health and Family Welfare looks after the health of the people.
4. In order to prevent 'Environmental Degradation' we can introduce farmers to eco-friendly agricultural practices like crop rotation, natural fertilisers and pesticides.

### 25.2.1

1. The 'Stockholm Declaration' of 1972 highlights the consequences of unrestrained growth and the linkages between several global problems.
2. A 'Commission on Sustainable Development' (CSD) was established to follow up the Rio agreements of 1992, and it monitors the agreements of the 'Earth Summit' at the local, National, Regional and International levels
3. 'WSSD' stands for 'World Summit on Sustainable Development'. This was a ten year review in 2002 of the Earth Summit (Rio Summit 1992). The WSSD was held in Johannesburg, South Africa. It urged the Nations to make progress in the formulation and implementation of strategies for 'Sustainable Development' and to begin implementing them by 2005.

### 25.2.2

1. In the year 2000, the largest-ever gathering of world leaders agreed to a set of time-bound and measurable goals for combating poverty, hunger, disease, illiteracy, environmental degradation and discrimination against women, to be achieved by 2015. These are called the 'Millennium Development Goals'.
2. The 'Kyoto Protocol' entered into force in 2005 and it legally binds developed country to goals for greenhouse gas emission reductions. It also binds developing Countries to establish Clean Development Mechanisms.
3. It was in 2007 under the 'Montreal Protocol', on Substances that Deplete the Ozone Layer, Countries agreed to an accelerated phase-out schedule for hydro chlorofluorocarbons (HCFCs).
4. In 2012, at the United Nations's 'Climate Change Conference' in Doha, Countries agreed to extend the 'Kyoto Protocol' that was to end in 2012 to 2020.

### 25.3

1. 'Sustainable Development' is needed to preserve the diversity of the eco system. Two factors important for attaining sustainable development are:
   i. Preservation of biological diversity in terrestrial, freshwater and marine systems.
   ii. Sustainable use of resources and minimising the depletion of resources.
2. The Agenda of 'Sustainable Development' is an inclusive growth. That means a pattern of a development that involves all sectionis of Community– the well off, the poor men and women. Such a pattern of growth is based on the need to preseve the diversity of the eco-system.

### 25.4.1 and 25.4.2

1. The focus in the first phase was to protect the environment. This phase came largely in the wake of 'Stockholm Conference' of 1972 which required all signatories to adopt measures to protect the environment. The highlights were constitutional amendments and the enactment of legislations to protect the wildlife and to arrest water and air pollution.
2. Through **Article-51A (g)** protection of the environment was made a Fundamental Duty of all citizens.
3. The Bhopal Gas Disaster happened in 1984.
4. In response to the 'Rio Declaration' that called upon Nations to develop laws regarding liabilities and compensation to victims of pollution and other environmental damages two Acts were formulated the National Environment Tribunal Act, 1995 (Repealed) and the National Environment Appellate Authority Act. These have been subsequently repealed and replaced by the new **National Green Tribunal Act of 2010**.

### 25.4.3 and 25.4.4

1. The focus in the Third Phase was on combining economic development with social and environmental issues. Legislations and amendments to the existing legislations were enacted to achieve compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) keeping in mind the principles of the Convention on Biological Diversity (CBD).
2. The Biological Diversity Act, 2002 was framed keeping in mind the Principles of CBD. The legislations are directed towards ensuring the sovereign rights of countries over their genetic and biological resources and the acceptance of the need to share benefits flowing from commercial utilization of biological resources with holders of indigenous knowledge.
3. The Patents (Amendment) Act of 2005 has a provision to prevent misappropriation of indigenous knowledge of communities by making it non-patentable.
4. A 'Rights Based Approach' is one in which the focus is on ensuring the rights of all sections of community particularly the marginalised. These include legislations like the Human Rights Act 1993; Right of Children to Free and Compulsory Education Act, 2009 and Commissions for the Protection of Child Rights Act, 2005; The Maintenance and Welfare of Parents and Senior Citizens Act, 2007; The People with Disabilities Act, 1995. This was adopted in the fourth phase.

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# GENERAL PRINCIPLES OF ENVIRONMENTAL LAW

The protection of environment is a global issue as it concerns all countries irrespective of their size, stage, development or ideology. With the development of science and technology and with the increase in population, tremendous changes in the environment have taken place and this ultimately changes the eco system of the world.

In order to balance ecology and economy and its sustainability, two main international conferences on the development of environmental law have been held. The first was Stockholm Conference, 1972 which is known as 'Earth Summit' and the Second International Conference was 'R10 Conference' on sustainable development popularly known as 'R10 Declaration' was held in the year 1992. The main object of 'R10 Conference' was to strike a balance between ecology and economy and its sustainability.

In India, laws have been enacted to check water and air pollution and also for the safety and protection of forests and wild life. These Law are to prevent and control Water Pollution, Air pollution and the Environment Protection.

Global environmental crisis has questioned the modernity and its values. The very existence and survival of man and other forms of life have become a matter of deep concern. The basic environmental principle that follow is "the blessings of the environment should be enjoyed by the present generation and succeeded to the future generations, a sustainable society should be created where environmental pressure by human activities are minimized.

## OBJECTIVES

After completing this lesson you will be able to:

- know the meaning of 'Environment';
- understand the meaning of 'Pollution';
- describe the the 'Polluter Pays Principle';

Notes

- list the main provisions of the (Prevention and control of Water Pollution) Act, 1974
- list the main provisions of the (Prevention and control Air Pollution) Act, 1981
- list the main provisions of the Environment (Protection) Act, 1986;
- understand the meaning of the term 'Two–Fold Liability';
- define the 'Precautionary Principle';
- describe the concept of Public Trust Principle'; and
- explain the 'Public Trust Doctrine'

## 26.1 ENVIRONMENT

The term 'Environment' is a sum total of water, air and land and the interrelationships that exist among them with the human beings, other living organisms and materials. The dictionary defines 'Environment' as "*anything, everything surrounding us*".

### Pollution

Pollution is the introduction of contaminants into the natural environment that cause adverse changes. Pollution can take the form of chemical substances or energy, such as noise, heat or light. Pollutants, the components of pollution, can be either foreign substances or naturally occurring contaminants.

According to the Supreme Court, in the case of ***M.C. Mehta v. Union of India***, pollution is a civil wrong, by its very nature it is a tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution, has to compensate for the restoration of damage caused to the environment and ecology.

## INTEXT QUESTIONS 26.1

1. Define ther term 'Environment'.
2. What do you understand by the term 'Pollution'?

## 26.3 THE POLLUTER PAYS PRINCIPLE

In environmental law, 'the Polluter Pays Principle' has been enacted to make the party responsible for producing 'pollution' to pay for the damage done to the natural environment. In simple words "The Polluter Pays Principle is the commonly accepted practice that those who produce pollution should bear the

costs of managing it to prevent damage to human health or the environment." For instance, a factory that produces a potentially poisonous substance as a by-product of its activities is usually held responsible for its safe disposal.

'Polluter Pays Principle' is also known as 'Extended Producer Responsibility' (EPR). This is a concept that was described by *Thomas Lindhqvist* for the Swedish Government in 1990.

The credit for popularizing the 'Polluter Pays Principle' for the first time goes to **Organisation for Economic Co-operation and Development** (OECD). The OECD defines EPR as "a concept where manufacturers and importers of products should bear a significant degree of responsibility for the environmental impacts of their products throughout the product life-cycle, including upstream impacts inherent in the selection of materials for the products, impacts from manufacturers' production processes itself, and downstream impacts from the use and disposal of the products."

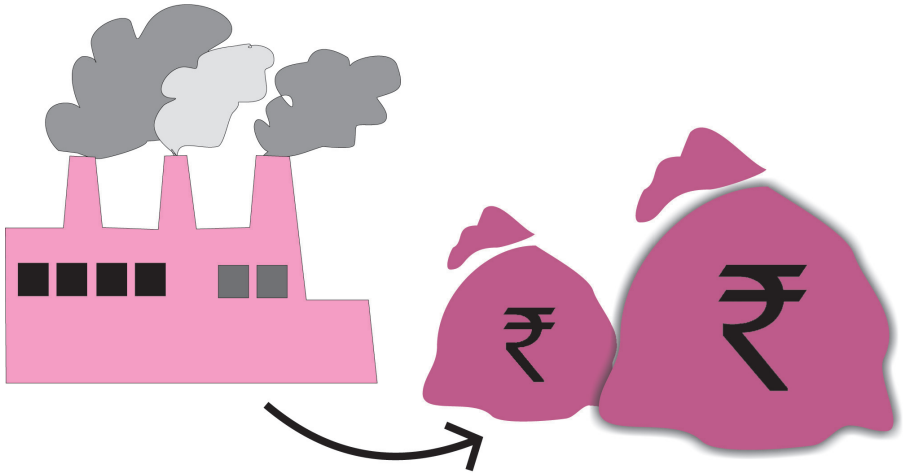


**Figure 26.1:** Polluter to pay

The Supreme Court of India interpreted '**Polluter Pays principle**' as the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation.

The **Environment Protection Act, 1986** expressly empowers the government "to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of environment".

Thus, it includes environmental costs as well as direct costs to the people or property. So, it means that polluter should bear the cost of pollution as the polluter is responsible for it.

The 'Polluter Pays Principle' has been incorporated into the **European Community Treaty**. Article 102 Rule 2 of the Treaty states that environmental considerations are to play a part in all the policies of the community, and that action is to be based on three principles:

i. The need for preventive action;

ii. The need for environmental damage to be rectified at source; and

iii. That the polluter should pay

The 'Polluter Pays Principle' finds prominent place in the **'Rio Declaration of 1992'**. Principle 16 of the Declaration proclaims that national authorities should endeavour to promote the internationalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

## INTEXT QUESTIONS 26.2

1. Explain the 'Polluter Pays Principle'?
2. Discuss Principle 16 of 'RIO Declaration of 1992'.

## 26.3 TWO-FOLD LIABILITY

The 'Polluter Pays Principle' exposes the polluter to two fold liability namely:

(i) Compensation to the victims of pollution; and

(ii) Ecological restoration

But despite its different impact on pollution, the doctrine of Polluter Pays Principle is limited in the sense that it can be applied only at the remedial stage i.e. after the pollution has already taken place. It means one may "pay and pollute".

## INTEXT QUESTIONS 26.3

1. The 'Polluter Pyas Principle' exposes the polluter to two fold libaility. (True/False)
2. 'The Polluter Pays Principle' can be applied only after the pollution has already taken place. (True/False)

## 26.4 THE PRECAUTIONARY PRINCIPLE

'Precautionary Principle' plays a significant role in determining whether the development process is sustainable or not. Precautionary Principle underlies

sustainable development which requires that the developmental activity must be stopped and prevented if it causes serious and irreversible environmental damage.

**Figure 26.2:** Protect Environment

The Precautionary Principle ensures that a substance or activity posing a threat to the environment is prevented from adversely affecting it, even if there is no conclusive scientific proof linking that particular substance or activity to the environmental damage.

Inadequacies of science are the real basis that has led to the emergence of Precautionary Principle. The Principle is based on the theory that it is better to be on the side of caution and prevent environmental harm which may indeed become irreversible.

The Precautionary Principle has been given utmost importance in the **United Nation's Conference on Environment and Development** held at Rio in 1992. Principle 15 of the **'Rio Declaration'** states:

"In order to protect the environment, the precautionary approach shall be widely applied by the States according to their capabilities, where there are threats as serious as of irreversible environmental degradation."

The Supreme Court of India in case of ***Vellore Citizens' Forum v. Union of India***, held that the Precautionary Principle is a part of the environmental law of the country.

## Precautionary Principle

The essential ingredients of Precautionary Principle are:

- Environmental measures by the State Government & the statutory authorities like state pollution boards must anticipate, prevent and attack the causes of environment degradation.

Notes

- Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

## INTEXT QUESTIONS 26.4

1. Define 'The Precautionary Principle'.
2. Identify the two essential imgridients of the Precautionary Principle.

## 26.5 THE PUBLIC TRUST DOCTRINE

The 'Public Trust Doctrine' is the principle that certain resources are preserved for public use, and that the government is required to maintain them for the reasonable use of the public.

The ancient Roman Empire developed a legal theory known as '**The Doctrine of Public Trust**', which was founded on the ideas that certain common properties such as rivers, seashore, forests and the air were held by government in trusteeship for the free and unrestricted use of the general public.

The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea water and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being gifts of nature, they should be made freely available to everyone, irrespective of the status in life. The doctrine enjoins upon the government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or for commercial purposes.

The State is the 'Trustee' of all natural resources, which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, air, forests and ecologically fragile lands. The State as 'Trustee' is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership. As rivers, forests, minerals and such other resources constitute a nation's natural wealth, these resources are not to be frittered away and exhausted by any one generation. Every generation owes a duty to all succeeding generations to develop and conserve the natural resources of the nations in the best possible way. This is in the interest of the nation as well as in the interest of the mankind. Thus, the Public Trust Doctrine is a part of the law of the land. The court also ruled that there is no any justifiable reason to rule out the application of the Public Trust Doctrine to all eco systems in India.

The Doctrine was first mentioned by the Honourable Supreme Court applied the 'Doctrine of Public Trust' with regard to the protection and preservation

of natural resources. The Supreme Court stated that the Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and forests have such great importance to the people as a whole that it would not be justified to make these resources a subject of private ownership .

The Honourable Supreme Court held that the Mahapalika, as a 'trustee' for the proper management of the park, has to be more cautious in dealing with its properties. The maintenance of the park because of its historical importance and environmental necessity was in itself a public purpose. If the true nature of the park, as it existed is destroyed, it would be violative of the 'Doctrine of Public Trust'.

### Restrictions imposed by the Public Trust Doctine

This Doctrine imposes three kinds of restrictions on the State:

- the property must not only be used for a public purpose, it must be available for use by the general public;
- the property must not be sold, even for fair cash equivalent; and
- the property must be maintained for particular kind of uses, such as navigation, recreation, or fishery

Ultimately, under this Doctrine, the State has a duty as a 'Trustee' under Article 48A of the Constitution of India to protect and improve the environment and safeguard the forests and wildlife of the country. While applying Article 21 of the Constitution of India (right to life), the State is obliged to take account of Article 48A of Directive Principle of State Policy. The State's trusteeship duties have been expanded to include a right to 'a healthy environment'.

## INTEXT QUESTIONS 26.5

1. Define the 'Public Trust Doctrine/Principle'.
2. List the restrictions imposed on State by the Public Trust Doctrine.

## WHAT YOU HAVE LEARNT

The protection of environment is a global issue as it concerns all countries irrespective of their size, stage, development or ideology. With the development of science and technology and with the increase in population, tremendous changes in the environment have taken place. The very existence and survival of human being and other forms of life have become a matter of deep concern.

Anything, everything surrounding us is 'Environment'. The 'Environment' is a sum total of water, air and land and the interrelationship that exits among them with the human beings, other living organisms and materials;

'Pollution' is the introduction of contaminates into the natural environment that cause adverse changes. 'Pollution' is a civil wrong. Pollution can take the form of chemical substances or energy, such as noise, heat or light. Pollutants, the components of pollution, can be either foreign substances/energies or naturally occurring contaminates.

In environmental law, the 'Polluter Pays Principle' means that those who produce pollution should bear the costs of managing it to prevent damage to human health or the environment. This for the damage done to the natural environment. 'Polluter Pays Principle is also known as 'Extended Producer Responsibility (EPR).

The 'Polluter Pays Principle' exposes the polluter to 'two-fold liability –(i) compensation to the victims of pollution, and (ii) ecological restoration. This is known as 'Two–fold Liability.

The 'Precautionary Principle' insures that a substance or activity posing a threat to the environment is prevented from adversely affecting it, even if there is no conclusive scientific proof linking that particular substance or activity to the environmental damage.

The 'Public Trust Doctrine' is the principle that certain resources are preserved for public use and that the government is required to maintain them for the reasonable use of the public. State is the 'Trustee' of all natural resources, which are by nature meant for public use and enjoyment.

## TERMINAL EXERCISES

1 Define the following terms :

(a) Environment

(b) Pollution

2. Describe 'the' Polluter Pays Principle'.
3. Explain principle 16 of the 'R10 Declaration of 1992;.
4. Define 'The Precautionary Principle.
5. What is the 'Two–Fold Liability' in the 'Polluter Pays Principle'?
6. Describe the essential ingredients of the Precautionary Principle.

7. Discuss the Public Trust Doctrine.
8. List the three kinds of restrictions imposed on State by the 'Doctrine of Public Trust'.

## ANSWERS TO INTEXT QUESTIONS

### 26.1

1. The 'Environment' is the sum total of water, air and land and the interrelationships that exist among them with the human beings, other living organisms and materials.
2. 'Pollution' is a civil wrong, by its very nature it is a tort committed against the community as whole. Pollution can take the form of chemical substances or energy, such as noise, heat or light. Pollutants, the components of pollution, can be eighter foreign substances or naturally occurring Contaminants

### 26.2

1. 'Polluter Pays Principle' makes the party responsible for producing pollution to pay for the damage done to the natural environment. In simple words the polluter pays principle is commonly accepted practice that those who produce pollution should bear the costs of managing it to prevent damage to human health or the environment.
2. Principle 16 of the RIO 'RIO Declaration' of 1992 proclaims that national authorities should endeavour to promote the internationalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should fear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

### 26.3

1. True
2. True

### 26.4

1. The Precautionary Principle is that Principle which ensures that a substance or activity posing a threat to the environment is prevented from adversely affecting it, even if there is no conclusive scientific proof linking that particular substance or activity to the environmental damage.
2. The two essential ingredients of Precautionary Principle are :

Notes

(i) Environmental measures by the State Environment and the Statutory authorities must anticipate., prevent and attack the causes of environmental degradation

(ii) Where there are threats of serous and irreversible damage, lack of scientific certainty should may be used as a reason for postponing measures to prevent environmental degradation.

## 26.5

1. 'Public Trust Doctrine' is the principle that certain resources are preserved for public use, and that the Environment is required to maintain them for the reasonable use of the public. State is the 'Trustee' of all natural resources which are by nature meant for public use and enjoyment.
2. The 'Doctrine of Public Trust' imposes the following three kinds of restrictions on the state :

   (a) The property must not only be used for a public purpose, it must be available for use by the general public;

   (b) The property must not be sold, even for fair cash equivalent; and

   (c) The property must be maintained for particular king of uses, such as navigation, recreation, or fishery.

Notes

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# CONTEMPORARY DEVELOPMENTS

As the field of environment is an emerging and evolving area both at the national and international level, it becomes important to keep oneself abreast with the new developments. Establishment of National Green Tribunal (NGT), Regulation of Hazardous Wastes at the National level and Kyoto Protocol and few other international instruments at the International level are some of the key contemporary developments. Apart from Kyoto Protocol there are several other initiatives which have also been undertaken at the International level and which have contributed towards the cause of global environment protection.

Around 1980, the Indian legal system, particularly the field of environmental law, underwent a sea change in terms of discarding its traditional approach and it was marked by not only administrative and legislative activism but also judicial activism. 'Judicial Activism' refers to the active role played by the Courts in India by adopting new and innovative interpretations of the constitutional rights expanding their ambit. In determining the scope of the powers and functions of administrative agencies and in striking a balance between the environment and development, the Courts have played a crucial role and will continue to have this role. This activism of Courts have been strengthened by the tool of Public Interest Litigation (PIL), which has enabled the Courts to entertain cases from public spirited individuals and Non-Governmental Organisations active in the area of environmental protection. The Indian Courts, in this regard, have given some landmark judgements which have established the roots of environmental jurisprudence in India. This lesson aims to discuss the activ role played by the Courts in India and the contribution which the Public Interest Litigation has made in this regard. The lesson will highlight all these important issues relating to environmental protection.

## OBJECTIVES

After studying this lesson, you will be able to:

- explain the functions and role of National Green Tribunal (NGT);
- comprehend the Law relating to regulating of hazardous wastes;

- identify the main objectives of 'Kyoto Protocal';
- list some other International Instruments directed at curbing environmental degradation;
- appreciate the role of Courts in enviromental protection;
- explain the role of Public Interest Litigation (PIL) in environmental protection;
- understand the concept of 'Judicial Activitsm' and
- appreciate the role of some leading Judgements to protect environment.

## 27.1 NATIONAL GREEN TRIBUNAL (NGT)

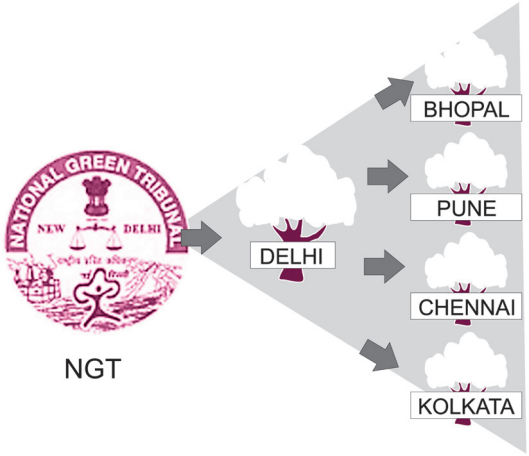
A Tribunal has trappings of a Court. Every Court is Tribunal but Tribunals are not Courts. A Tribunal is established for the adjudication of disputes related to some specific areas, whereas courts exist for the adjudication of all kinds of disputes regardless of any specific area. Rules of natural justice ensure fairness in any adjudicatory process. Final judgement of Tribunal is generally called 'award'.

The National Green Tribunal was established on 18th October, 2010 under the National Green Tribunal Act, 2010 for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto. It is a specialized body equipped with the necessary expertise to handle environmental disputes involving multi-disciplinary issues.

The Tribunal is to make efforts for disposal of applications or appeals finally within six months of filing of the same. Initially, the NGT was proposed to be set up at five places of sittings and follow circuit procedure for making itself more accessible. New Delhi is the principal place of sitting of the Tribunal and Bhopal, Pune, Kolkata and Chennai are the other four place of sitting of the Tribunal.

### 27.1.1 Composition of National Green Tribunal (NGT)

NGT comprises of both judicial and expert members as adjudicators. The Chairman of NGT is a judicial member and must be or has been a judge of the Supreme Court of India or Chief Justice of a High Court. The Chairman is appointed by the Central Government in consultation with the Chief Justice of India. Other judicial



members of the NGT must be or has been a judge of the High Court. For an expert member a person must have a doctorate degree in life sciences or physical sciences with fifteen years experience in the relevant field including five years practical experience in the field of environment and forest in a reputed national level institution or an administrative experience of fifteen years including experience of five years in dealing with environmental matters in the Central or State Governments or in a reputed National or State level institution. The Judicial and expert members are appointed by the Central Government on the recommendation of a Selection Committee.

### 27.1.2 Jurisdiction and Powers of NGT

Jurisdiction means authority of any Court or Tribunal to accept a matter for hearing and decision. NGT has the jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment), is involved and such question arises out of the implementation of the enactments specified in Schedule I of the National Green Tribunal Act, 2010. Schedule I of the Act lists following legislations:

(i) The Water (Prevention and Control of Pollution) Act, 1974;

(ii) The Water (Prevention and Control of Pollution) Cess Act, 1977;

(iii) The Forest (Conservation) Act, 1980;

(iv) The Air (Prevention and Control of Pollution) Act, 1981;

(v) The Environment (Protection) Act, 1986;

(vi) The Public Liability Insurance Act, 1981;

(vii) The Biological Diversity Act, 2002.

This explains the importance of NGT, as the above mentioned legislations together stands for what we know as the 'Environmental Law'. So now on for the enforcement of Environmental Law, be it matters related to Water Pollution, Air Pollution, Forest Conservation, Environment Protection or Biological Diversity, we have NGT.

NGT is empowered to provide by an order:

- Relief and compensation to the victims of pollution and other environmental damage arising under the enactments specified in Schedule I (including accident occurring while handling any hazardous substance) of the Act.
- For restitution of property damaged
- For restitution of the environment for such area or areas

The above mentioned remedies must be claimed by the persons aggrieved within 5 years from the date when the cause of action arose. Cause of action means the happening of the very reason which enables the person to approach NGT. Though, in exceptional cases the Tribunal may give sixty more days for filing

of the application before it, if the Tribunal is satisfied that the applicant was prevented by a sufficient cause to file the application within 5 years.

The Act mandates that in case of accident, the Tribunal shall, apply the principle of 'no fault'. 'No fault principle' stipulates that in case of accident the owner or the employer cannot take the defence of him/her having committed no fault. If accident occurs and as a consequence of it damage is caused to any person or environment, the owner or the employer is liable, only because of the fact that accident occurred in his/her enterprise. Apart from this principle, NGT has to also apply the principles of 'Sustainable Development', 'precautionary principle' and 'polluter pays principle', while giving an order or decision or award.

### 27.1.3 Procedure

NGT is not bound to follow the procedures laid down in the Code of Civil Procedure, 1908; or the Indian Evidence Act, 1872; rather it has to be guided by the principles of natural justice. It has for the purposes of discharge of its functions all the powers of the Civil Court for trying a suit as given under the Code of Civil Procedure, 1908. Any decision, order or 'award' of the Tribunal is executable by the Tribunal as a 'decree' of the Civil Court and, therefore, for this purpose the 'Tribunal' will have all the powers of a Civil Court. The Tribunal can also if it deems fit transmit its order or award for execution to a Civil Court having local jurisdiction as if it were the 'decree' of that Civil Court. Minimum number of members who must together hear and decide a case is two, out of which one must be a judicial member and other an expert member. The decision of Tribunal by majority is binding. In case the opinion of the bench is equally divided then the matter is to be heard and decided by the Chairman of NGT if he/she was not part of the equally divided bench. In cases, where the Chairman himself/herself is part of the equally divided bench then he/she shall refer the matter to other member of the Tribunal not part of that equally divided bench to hear the case and decide.

### 27.1.4 Penalty

Whoever fails to comply with any order, decision or award of the NGT under the National Green Tribunal Act, 2010, commits a cognizable offence and shall be punishable with an imprisonment for a term which may extend to three years or with fine which may extend to 10 Crore rupees (25 Crore in case of a company) or with both and in case the failure or contravention continues, with additional fine which may extend to 25,000 Crore (1 Lakh Crore in case of a company) for every day during which such failure or contravention continues after conviction for first such failure or contravention.

Where any Department of the Government fails to comply with any order or 'award' or decision of the tribunal under this Act, the Head of the Department

shall be guilty of such failure and shall be liable to be proceeded against for having committed an offence and punished accordingly. Provided that if such Head of the Department proves that he/she exercised due diligence and that he had no knowledge about the commission of the offence he shall not be punished. Apart from this any other Government officer may also be punished accordingly for such offence if it can be proved that the offence was committed with the consent or connivance of such officer or is attributable to his/her neglect.

### 27.1.5 Appeal

In an appeal the person who has lost the case can again challenge the decision made by the NGT before the Supreme Court. Any person aggrieved by any decision, order or award of the Tribunal, may file an appeal before the Supreme Court within 90 days from the date of communication of such decision, order or award. Though, the Supreme Court may allow a person to file such appeal even after 90 days if the Court is satisfied that the person appealing was prevented to do so for sufficient cause.

## INTEXT QUESTIONS 27.1

1. What is main reason for the establishment of Tribunals?
2. What was the main purpose for the establishment of National Green Tribunal (NGT)?
3. Explain 'No Fault Principle'.
4. Where a person aggrieved by any order, decision or award of NGT can go in appeal?
5. What is the minimum number of members needed to constitute a bench of NGT, which can hear and decide a case?

## 27.2 REGULATION OF HAZARDOUS WASTES

Disaster occur both due to natural and man-made activities. The adverse impact caused due to the indiscriminate disposal of hazardous wastes comes under the category of environment disasters. For example the release of Methyl Isocyanate (MIC) gas in Bhopal from the Union Carbide factory in the year 1984 caused severe disaster taking thousands of human lives and adversely affecting the health of even the future generations of the people affected it.

Control and regulation of hazardous substances has always been the main concern in the exercise of environment protection. The issue has been specifically addressed under the Environment Protection Act, 1986 by way of delegated legislations. A delegated legislation refers to the legislative function of the executive organ of the government. This takes place under the legislation enacted by the legislatures which authorises the executive to frame rules for the

actual implementation of the legislation enacted. The name delegated refers to the delegation of the power to legislate under the legislation by the legislature to the executive after laying down the broad policy objectives in the legislation. The Delegated legislation under the Environment Protection Act, 1986 includes the Hazardous Wastes (Management and Handling) Rules, {HW (M&H) Rules} 1989 made by the Government of India through the Ministry of Environment and Forests (MoEF). In order to encourage the implementation of these rules the MoEF has further brought out guidelines for HW (M&H) Rules in the year 1991. These rules provide for a regulatory framework for the handling of hazardous wastes.

### 27.2.1 Definition of Hazardous Substance

A 'hazardous substance' is defined not only as a substance, but also as a preparation, which by reason of its chemical or physico-chemical properties or handling is liable to cause harm to human beings, other living creatures, plants, micro-organisms, property or the environment.

This definition explains the nature of what may be considered a hazardous substance. These are present in our surroundings which may harm our environment and hence there needs to be some guidelines for dealing with such substances, so as to protect our environment from the potential harm. An example of hazardous waste can be industrial waste, which is waste collected from a factory meant for manufacturing certain goods.

### 27.2.2 Procedure for the Regulation of Hazardous Wastes under HW (M&H) Rules

**A. Identification of Hazardous Waste Generation** - Identification of the hazardous waste generating industries is the first step.

**B. Data Collection** - After identifying the 'hazardous waste' generating industries, the inventory of data pertaining to hazardous waste generation can be prepared by conducting surveys in each of the identified industries.

**C. Waste Characterisation** - The 'hazardous waste' that is generated from the study region should be characterized. This can be done in the laboratory. Detailed hazardous waste characterisation pertaining to physical, chemical and general characteristics, and properties pertaining to ignitability, corrosivity, reactivity & toxicity is to be taken.

**D. Identification of site for disposal** - After quantifying the 'hazardous waste' and assessing the probable area requirements for its treatment, storage and disposal, the sites are to be identified.

**E. Conducting Environmental Impact Assessment (EIA) -** The impacts from the project should be identified and public acceptance should be obtained for clearing the site for Treatment, Storage and Disposal facility.

**F. Implementing Treatment, Storage and Disposal Facility -** The treatment, storage and disposal facility programme should be implemented at the final designated site. The site should contain adequate provisions for storage, treatment and final disposal. The site should have laboratory facilities to monitor these functions.

The above mentioned steps need to be followed carefully for guarding our environment from the dangers which the existence of hazardous waste may cause to it. Proper treatment, storage and disposal of hazardous wastes are the need of the hour for a pollution free environment.

## INTEXT QUESTIONS 27.2

1. Define 'Hazardous Waste'?
2. How a 'Hazardous Waste' may impact us?
3. What was the main objective behind the making of Hazardous Wastes (Management and Handling) Rules, 1989?
4. How do you define by EIA in relation to the management and handling of hazardous waste?

## 27.3 KYOTO PROTOCOL

Environment protection is not territorial but a global concern and therefore, the effort to protect the environment is going on also at the international level as the environmental policy of any country does not only affects the environment of that country, rather it affects in whatever extent possible, the global environment. 'Kyoto Protocol' is the example of a measure undertaken at the international level under the aegis of the United Nations aimed at curbing the emission of Greenhouse gases (Carbon Dioxide, Methane, Nitrous Oxide, Sulphur Hexafluoride and two groups of gases hydro fluorocarbons & per fluorocarbons) by the industrialised countries, which adversely impacts the global environment.

'Kyoto Protocol' is the part of the United Nations Framework Convention on Climate Change (UNFCC). UNFCC sets an overall framework for inter-governmental efforts aimed at tackling the challenges of climate change. Climate Change refers to the fact that due to developmental human activities the original climate of the world is changing and the average temperature of

world is rising every year and this will result in climate change which may have very serious consequences for present and future generations. The increase in temperature is primarily because of the emission of greenhouse gases, which are emitted mainly from industries. This also adds to the depletion of the ozone layer which prevents the harmful effects of the sun from reaching the Earth. Therefore, this is a movement to protect the world inhabited by us from becoming a world unsuitable for human existence.

The 'Kyoto Protocol' sets binding obligations on industrialised countries to reduce emission of Greenhouse gases. The Protocol was adopted on 11 December 1997 in Kyoto, Japan and entered into force on 16 February 2005. More than 190 countries are the members of the Protocol, significantly though the United States of America is not the member of the Protocol. India is also a member of the Protocol.

Some of the principal concepts of the 'Kyoto Protocol' are:

- Under the Protocol 37 industrialised countries and European Union made up of 15 European countries (called Annexure 1 countries) have committed themselves to binding obligations to reduce emission of greenhouse gases.
- In order to meet the objectives of the Protocol, Annex I, Parties are required to prepare policies and measures for the reduction of greenhouse gases in their respective countries. In addition, they are required to increase the absorption of these gases.
- Accounting, Reporting and Review in order to ensure the implementation of the Protocol.
- Establishing a Compliance Committee to enforce compliance with the commitments under the Protocol.

'Kyoto Protocol' is a very important milestone as it is an acknowledgement of the fact that in the name of industrial development the environment cannot be harmed to such an extent that we render it unsuitable for a healthy human existence. Industrialised countries by accepting the binding obligation to reduce the emission of the greenhouse gases have accepted their collective responsibility in making the global environment cleaner and healthier and thereby realizing the goal for a sustainable development. This obviously is a work in progress but what is important is its realisation and the exhibition of a global will to address this menace.

## INTEXT QUESTIONS 27.3

1. Identify the gases that are called the 'greenhouse gases'?
2. What is the impact of 'greenhouse gases' on our environment?

Notes

3. Define the main aim or objective of 'Kyoto Protocol'?
4. How will the reduction in the emission of greenhouse gases protect our environment?

## 27.4 OTHER INTERNATIONAL INSTRUMENTS

International Instruments are like legislations and rules drafted by the different countries coming together at the international level to make laws applicable to them. Kyoto Protocol is not the only instrument directed at curbing environmental degradation, in fact there are several such measures that have been undertaken at the international level. These international instruments collectively constitute what is known as International Environmental Law. These laws have affected the growth of environmental law in many countries to a great extent. India's main environmental legislation the Environment Protection Act, 1986 was also enacted in order to give effect to the decisions taken at the United Nations Conference on the Human Environment held at Stockholm in June, 1972.

Some of the important International Instruments are -

### 1. The Stockholm Declaration, 1972

- Laid the foundation of the modern global environmental law.
- Recognizes that different approaches are required to tackle problems of developed and developing countries.
- Recognizes a healthy environment as an extension to the right of life.
- Introduces the concept of inter-generational equity.
- Calls for balancing the needs of the environment with those of development
- Nations have the sovereign right to exploit their own resources, subject to the responsibility not to cause damage to the environment of other States.

### 2. The Vienna Convention for the Protection of the Ozone Layer, 1985

- It is a framework treaty within which member states share research and information, develop technologies, etc, for the protection of the Ozone layer

### 3. The Montreal Protocol on Substances that Deplete the Ozone Layer, 1987

- Protocol requires parties to reduce the consumption of ozone-depleting substances to certain stipulated levels.
- Developing countries given a grace period of 10 years to comply.

**4. The Report of the World Commission on Environment and Development ("The Brundtland Commission"), 1987**

- Milestone in the development of international environmental jurisprudence and policy
- Established the doctrine of "Sustainable Development"

**5. The Rio Declaration on Environment & Development, 1992**

- Builds on the principles of sustainable development, inter-generational equity, and sovereign rights in the Stockholm Declaration.
- Expands the concept of sustainable development.
- Reaffirms, amongst others, the importance and centrality of:
  - The Precautionary Principle,
  - The Polluter Pays Principle, and
  - Environmental Impact Assessment

**6. The U.N. Convention on Biological Diversity (1992)**

Three main goals:

1. The conservation of biological diversity;
2. The sustainable use of its components; and
3. The fair and equitable sharing of the benefits from the use of genetic resources.

In 2000, a supplementary agreement - the Cartagena Protocol on Biosafety - sought to protect biological diversity of states against risks from living, modified organisms created by biotechnology.

In April 2002, the parties to the Convention committed themselves to achieving the target of "a significant reduction in the current rate of biodiversity loss at the global, regional and national level," by 2010.

**7. Agenda 21, 1992**

Comprehensive road-map of action to be taken at the global, national, and local levels, for the protection of the environment framed at the Rio Summit.

**8. The United Nations Framework Convention on Climate Change (UNFCC), 1992**

This sets an overall framework for intergovernmental efforts to tackle the challenge posed by climate change. Under the Convention, governments:

- gather and share information on greenhouse gas emissions, national policies and best practices

- launch national strategies for addressing greenhouse gas emissions and adapting to expected impacts, including the provision of financial and technological support to developing countries
- cooperate in preparing for adaptation to the impacts of climate change

The Convention entered into force on 21 March 1994.

These international instruments clearly reflect the fact that the issue of environment protection has been a matter of grave concern which has attracted international attention. All these instruments also acknowledge the fact that for environmental protection there cannot be a one stop solution; this is a continuous process which must continue incessantly.

## INTEXT QUESTIONS 27.4

1. Name any two International Instruments in the field of environment protection other than the 'Kyoto Protocol'.
2. What is the main objective of UNFCC?
3. Explain the three main objective of U. N. Convention on Biological Diversity (1992)?
4. What is stated in the U. N. Declaration for Environment & Development, 1992 (The RIO Declaration on Environmnet and Development)?

**ROLE OF JUDICIAL ACTIVISM IN ENVIRONMENTAL PROTECTION**

## 27.5 ROLE OF COURTS IN ENVIRONMENTAL PROTECTION

The concept 'the right to life' under Article 21 of the Constitution of India was not given an expansive dimension in the beginning but gradually Courts in India started expanding the meaning of this term by playing an active role. The question, how to bring about a balance between the environment and development, poses a great dilemma. **The Rural Litigation and Entitlement Kendra v. State of U.P.** is the first case where the Supreme Court of India made an attempt to look into this question. In this case, the petitioners, a voluntary organisation, feared that mining activities of the lessees caused ecological disturbance. The lessees had rights given by the Government and on conditions laid down under a specific law. According to a committee of experts, appointed by the Supreme Court, mining of limestone in certain areas was found dangerous and damaging ecological balance. The Supreme Court ordered to close the mining operations in these areas, though it allowed mining operations in certain areas reported as not dangerous. The Court considered the hardship caused to the lessee but thought that 'it is a price that has to be paid for protecting and safeguarding

the right of the people to live in healthy environment with minimal disturbance to ecological balance'. What is important is that the case was filed under Article 32 of the Constitution of India and orders were given with emphasis on the need to protect environment. Under Article-32 the Supreme Court of India can only be approached for the violation of fundamental rights and there is no specific fundamental right to environment mentioned as fundamental rights in our Constitution. This means that the Supreme Court treated the right to clean environment as a fundamental right and this can only be done by expanding the meaning of 'the right to life' as it appears in Article 21 of the Indian Constitution as one of the fundamental rights.

The right to humane and healthy environment is seen indirectly approved in the **M. C. Mehta group of cases** decided subsequently by the Supreme Court. In the first **M. C. Mehta (M. C. Mehta v. Union of India)** case, the Court had to deal specifically with the impact of activities concerning manufacturing of hazardous products in a factory. The activities were a threat to the workers in the factory, as well as members of the general public living outside. It was alleged that the leakage of Oleum gas from the factory resulted in the death of the person and affected the health of several others. The question was, whether or not the plant should be closed down. Many conditions were laid down under which industries of hazardous products should be allowed to restart. In doing so the Court found that the case raised 'some seminal questions concerning the scope and ambit of Articles-21 and 32 of the Constitution'.

Although the second *M. C. Mehta* case, (**M. C. Mehta v. Union of India**) the Court modified some of the conditions, the third **M. C. Mehta** case, (**M. C. Mehta v. Union of India**) posed an important question concerning the amount of compensation payable to the victims affected by leakage of Oleum gas from the factory. The Court held that it could entertain a petition under Article 32 of the Constitution, and laid down the principles on which the quantum of compensation could be computed and paid. This case is significant as it evolved a new jurisprudence of liability to the victims of pollution caused by an industry engaged in hazardous and inherently dangerous activity. Although it did not specifically declare the existence of the right to a clean and healthy environment in Article 21, the Court evolved the principle of 'absolute liability' of compensation through interpretation of the constitutional provisions relating to the right to live and to the remedy under Article 32 for violation of fundamental rights. The basis for this decision is clear and unambiguous – the fundamental right to a clean and healthy environment.

In **Chhetriya Pardushan Mukti Sangharsh Samati v. State of U. P.** and **Subhash Kumar v. State of Bihar**, the Honourable Supreme Court took a step forward. Chief Justice Sabyasachi Mukerji in **Chhetriya Pardushan** case observed:

> "Every citizen has a fundamental right to have the enjoyment of quality of life and living as contemplated in Art. 21 of the Constitution of India."

Justice K. N. Singh in *Subhash Kumar* case observed:

> "Right to live……..includes the right to enjoyment of pollution free water and air for full enjoyment of life."

The decisions of the Courts have widened the scope of the right to life by reading into it, the right to a clean environment. Thus, Courts in India have lived up to the needs of the time and have made significant contributions in evolving new principles and remedies.

## INTEXT QUESTIONS 27.5

1. Whether expanding the dimensions of Article 21 of the Constitution can be termed as an example of 'judicial activism'?
2. Whether Article-32 of the Constitution of India can be used by approaching the Supreme Court in case of violation of the right to clean environment?
3. Identify the nature of liability of an industry engaged in inherently dangerous and hazardous activity towards the victim of pollution caused by it?
4. Whether right to clean environment is a fundamental right specifically given by the Constitution of India?

## 27.6 ROLE OF PUBLIC INTEREST LITIGATION (PIL)

Contrary to the past practices (strictly as per the *locus standi* principle) wherein, only a person himself/herself, being aggrieved, could have come knocking the doors of the courts, today a person acting bona fide and having sufficient interest can move the courts for redressing public injury, enforcing public duty or for protecting social and collective rights and interests. This is known as the dilution of the principle of *locus standi.* The ability to invoke the jurisdiction of the Supreme Court and the High Courts under Articles 32 and 226 of the Constitution of India is a remarkable step forward in providing protection for the environment. Courts have widened the dimensions of the substantive rights to health and a clean and unpolluted environment. In most cases, this progress was made with aid of PIL. The courts by allowing a case to be filed as PIL have shown that the procedure cannot come in the way of ensuring that the justice is done. In **Tarun Bhagat Sangh Alwar v. Union of India,** a social action group challenged the legality of granting a mining license in the protected area of a forest. Upholding the contention, the Supreme Court observed;

"This litigation should not be treated as the usual adversarial litigation. Petitioners are aid of a purpose high on the national agenda. Petitioners concern for the environment, ecology and the wildlife should be shared by the Government"

The observation of the Court is important as it emphasises the rationale of PIL in environmental issues. Any person who raises an environmental issue, whether individual, group or institution is equally concerned with the problem as is the State. Such litigation can never be considered as one of adversarial confrontation with the State. In the 1984 case of *'Bandhua Mukti Morcha* v. *Union of India'*, Justice P. N. Bhagwati stated that if a person was physically or economically unable to approach the Court, he/she "may move the Court even by just writing a letter," because the legal system would otherwise be inaccessible to some of its citizens.

The range of issues in PILs has been very broad. It extends from compassion to animals and privileges of tribal people and fishermen, to the eco-system of the Himalayas and forests, eco-tourism, land use patterns and problems facing a village due to ecological damage. The cause of environment has been taken up before courts through PIL by a wide spectrum of people in society. Lawyers, association of lawyers, environmentalists, groups and centres dedicated to environment protection and forest conservation, welfare forums, consumer research centres have successfully agitated environmental issues before Courts.

## INTEXT QUESTIONS 27.6

1. Whether PIL is an example of the dilution of the strict principle of *'locus standi'*?
2. Who can file a PIL?
3. What are the kinds of issues that can be raised in a PIL?
4. What do you understand by an Adversarial System of Justice Delivery?

## 27.7 TECHNIQUES OF ISSUING DIRECTIONS

The powers of the Supreme Court to issue directions under Article-32 and that of the High Courts to issue directions under Article-226 have attained great significance in environmental litigation. There are several such directions which have resulted as milestones in the path of environmental protection.

### 1. Evolution of doctrines in environmental jurisprudence

The formulation of certain principles to develop a better regime for protecting the environment is a remarkable achievement of PILs. In *'M. C. Mehta* v. *Union of India'*, the Supreme Court formulated the doctrine of 'absolute

liability' for harm caused by hazardous and inherently dangerous industries. In *Sludge's case* (*'Indian Council for Enviro- Legal Action* v. *Union of India'*, when the people in a village suffering from lethal waste left behind by a group of chemical industries were asked to be given the compensation by such industries by the Supreme Court, the Court applied the 'Polluter's Pay Principle'.

The 'Precautionary Principle' came to be directly applied in *M. C. Mehta* v. *Union of India,* for protecting the Taj Mahal in Agra from air pollution. Expert studies proved that emissions from coke/coal based industries in the vicinity of Taj Mahal had damaging effect on Taj Mahal. The Supreme Court ordered that the potential polluters had to change over to natural gas as an industrial fuel and those that were not in a position to obtain gas connections- for any reason-should stop functioning in the vicinity of Taj Mahal and relocate themselves in alternative plots outside the demarcated area within a stipulated time.

The Supreme Court has also applied the principle of 'Sustainable Development' in several cases to balance the developmental concerns with the ecological balance. The **Rural Litigation and Entitlement Kendra v. State of U.P.** can be cited as an example here.

### 2. Protection of Social Environment

The rights to livelihood and clean environment are of grave concern to the courts whenever they issue a direction in an environmental case. Labourers engaged in the asbestos industry were declared to be entitled to medical benefits and compensation for health hazards which were detected after retirement by the Honourable Supreme Court in **'CERC v. Union of India'**.

### 3. Filling gaps in law and lacunae in administration

In most cases courts have issued directions to remind Government authorities of their responsibility to protect the environment. Thus, directions were given to local bodies, especially municipal authorities, to remove garbage and waste and clean towns and cities.

### 4. Environmental awareness and education

The directives of the Supreme Court went to the extent of spreading environmental awareness and literacy as well as the launching of environmental education not only at the school level, but also at the college level. In *M. C. Mehta* v. *Union of India***,** the Supreme Court emphasised the need for the awareness of environmental protection. The Court also required every State Government and Education Boards to take steps for environmental education.

Thus, it is clear from the above discussion that the PIL has played a very important role in the field of environment protection by empowering the courts in India to do whatever it can for this noble cause.

Notes

## INTEXT QUESTIONS 27.7

1. What do you mean by EPCA?
2. What do you mean by CNG?
3. What kind of pollution will be caused by vehicles?
4. What kind of pollution will be caused by industries putting their industrial waste into rivers?

## 27.8 LEADING JUDGEMENTS TO PROTECT ENVIRONMENT

We saw how 'judicial activism' has contributed immensely to the field of environmental protection. There are hundreds of such judgements which have collectively contributed to this cause, yet some of these judgements can be specifically highlighted which have considerably impacted the field of environmental protection. Most of these landmark judgements have also come through the means of Public Interest Litigation (PIL). From making the polluter to compensate for the pollution caused by it to declaring the concept of absolute liability for industries involved in inherently dangerous or hazardous activities, from forest preservation to initiatives for addressing the lack of civic amenities, from pollution of river Ganga to the kind of air people breath in Delhi, from directing the closure of mining operations posing environmental risk to protecting Taj Mahal from losing its shine because of air pollution; all these issues have been taken up by the courts in India to promote the objective of a clean and healthy environment. Some of such landmark cases include-

### 1. *The Delhi Vehicular Pollution Case*

The PIL was filed by M.C. Mehta, an established environmental activist and lawyer, in 1985. It is a citizen standing case. Mehta expressed his concern about the alarming rise in the levels of air pollutants and suspended particulate matters in the atmosphere over the city of New Delhi and the surrounding region. The result was pollution-related illnesses that included tuberculosis, asthma, and bronchitis and lung cancer. Mehta argued that the respondents, the Union of India and Delhi Administration and the DTC had acted against the common law of India and the environmental legislation. He claimed that he and Delhi residents had a right to live in a clean environment and this right had been breached by the respondents. He prayed that the Court would make an order against the respondents to take action to stop those vehicles that were emitting noxious gases.

The case was filed in 1985 but no action was taken until 1990. Thereafter, a series of directions were passed by the Supreme Court. There was progress, albeit slow. From 1990 to 1992 the Court ordered periodic vehicle emission checks, particularly focusing on public buses, with the power to cancel the registration certificates of faulty vehicles. As the litigation progressed, the Court responded by directing the authorities to introduce and use unleaded fuel in a three-phased manner, starting in Delhi and encompassing all India by 2001; converting Government vehicles to compressed natural gas; ensuring two- and three-wheeler vehicles had catalytic converters and compressed gas or unleaded fuel; and that a body be established to oversee the implementation of the Court's orders.

In January 1998, the Supreme Court endorsed the Central Government's proposal to create an expert authority, to be known as the Environment Pollution (Prevention and Control) Authority (EPCA).

However, in July 1998, the Court passed an 'historic' order which became the public battleground for the various stakeholders over an issue which claims more victims than the terrorists' guns. It included the phasing out of all commercial vehicles and taxis which were more than 15 years old as of October 1998; a ban on the supply of 2T oils at petrol stations by December 1998; the increase of public transport to 10,000 buses by April 2001, the stoppage of leaded petrol within NCT Delhi by September 1998; replacement of all pre-1990 auto rickshaws and taxis to new vehicles on clean fuel by 31 March 2000; no eight-year-old buses to ply except on CNG (Compressed Natural Gas) or other clean fuel by 1 April 2000; entire city bus fleet (DTC and private) be steadily converted to single fuel mode on CNG by 31 March 2001. The Court further stressed and directed that the authorities must take effective and adequate steps to bring to the notice of the public, both through print and electronic media, the directions issued by the judiciary from time to time. The July 1998 order provided time lines to be adhered to for bringing the change in the city. The judges, while delivering the order, stated: 'This timeframe, as given by EPCA and today by this Court, in consultation with the learned counsel for the parties, shall be strictly adhered by all the authorities. We administer a strong caution to all the concerned that failure to abide by any of the direction would invite action under the Contempt of Court Act against the defaulters.'

The next target of the Supreme Court was diesel vehicles, accounting for 90 per cent of the nitrogen oxide and respiratory suspended particulate matter. The diesel particulate is toxic and chronic exposure to such toxic air would lead to 300 cases of lung cancer per million. In 1999, restrictions were imposed on the monthly registration of diesel driven vehicles. Also, diesel taxis were prohibited in National Capital Region (NCR) Delhi unless they conformed to safety standards.

From 2000-2003, the focus of the Supreme Court was on the implementation of its orders. The Court applied the 'precautionary principle' to the auto fuel policy. The auto fuel policy focused upon the measures to anticipate, prevent and attack the cause of environmental degradation. These efforts eventually meant that all buses now run on CNG. The transport sector, including private vehicles, was given priority over the industrial sector with regard to the allocation of CNG. Thus, the mission embarked upon by the Supreme Court was successfully accomplished.

The *'Delhi Vehicular Pollution'* case reflects the commitment and dedication shown by the Supreme Court of India to protect the lives of the citizens. Judicial progress was slow, as was the implementation of its directions, but as a consequence of PIL actions Delhi's atmosphere is now relatively clean.

### 2. *M. C. Mehta* v. *Union of India*, *Ganga Pollution* case (AIR 1998 SC 1037)

The tanning industries located on the banks of Ganga were alleged to be polluting the river. The Supreme Court issued directions to them to set up effluent plants within six months from the date of the order. It was specified that the failure to do so would entail closure of business. The Court issued directions to the Central Government, U. P. Pollution Control Board and the District Magistrate concerned. The Court concluded that the closure of industries might result in unemployment and loss of revenue- life, health and ecology had greater importance. The Court is still monitoring the task of cleaning the river Ganga.

### 3. *Indian Council for Enviro-legal Action* v. *Union of India*, *The Bichhri Village* Case

Bichhri is a little-known village in the Udaipur district of Rajasthan. However, in 1988, a group of chemical industries established plants to produce hydrochloric acid and related chemicals for export. Although the production of this acid is prohibited in European countries, there remains a need for it. Thus, a remote village in India became a site for the production of this lethal chemical. 'Rogue Industries' commenced production of these chemicals without obtaining the appropriate 'no objection certificates' from the pollution control authorities. The factories' waste products amounted to between 2,400 and 2,500 metric tonnes that were highly toxic. At least 400 farmers and their families in eleven villages were directly affected by the groundwater pollution.

However, in October 1989, a PIL was filed in the Supreme Court by a Delhi-based NGO, the Indian Council for Enviro-Legal Action, led by Mr M.C. Mehta. The NGO presented the subhuman living conditions being experienced by the

villagers and requested remedial action by the court. The Supreme Court accepted the petition and thus began the legal struggle which continues to this day. Between 1989 and 1994, Orders were passed by the court. They included a request to establish an expert committee to examine the situation in and around the affected area and thereafter provide recommendations for both short- and long-term remedial action.

In February 1996, the Court declared the final order. It stated that 'absolute liability' rested with the rogue industries to compensate for the harm caused by them to the villagers in the affected area, to the soil and underground water and that they were bound to take all necessary measures to remove the sludge and other pollutants and defray the costs of remedial measures required to restore the land and underground water. The Court invoked the 'polluter pays' principle and empowered the central Government to determine and recover the cost of remedial measures from the industries. The Court ordered the closure of all chemical plants located in the Bichhri area. It is noteworthy that the Court suggested the establishment of dedicated environmental courts for the adjudication of such matters and the establishment of the National Green Tribunal fulfils this long standing demand made by the Court.

In November 1997, the Court required the industries to pay Rupees 37.38 Crores towards the cost of environmental remediation and Rupees 34.28 Lakhs to the villagers, which were not immediately complied with. Finally, in 2011, the Supreme Court imposed a compound interest of 12 per cent on the remedial amount of Rupees 37.38 Crores on the polluter for the 15-year delay in making the payment. The polluters were given two months to make the payment; failure to do so would result in the recovery being made as arrears. The polluting industries had no other option but to comply with the orders of the Court this time.

The importance of the *Bichhri* case is that it allowed the villagers' grievances to be heard via PIL. The application of Article 21, 'absolute liability' and the 'Polluter Pays Principle' makes the case a landmark judgment in India's emerging environmental jurisprudence.

### 4. *T. N. Godavarman Tirumulkpad* v. *Union of India*, (AIR 1997 SC 1228)

The idea of 'sustainable development' had its influence on the judiciary in interpreting the provisions of law relating to forest. Various dimensions of the problem came to be examined by the Supreme Court in this case. The decision of the Court can be summarised as follows:

- Mining license in forest area without proper approval by the Government is violative of the Forest (Conservation) Act. All on-going activities under

such invalid license must cease. The State Governments have to take necessary remedial measures.

- Running saw mills of any kind is a non-forest activity. All saw mills within a distance of 100 kilometres from the border of the State of Arunachal Pradesh are to be wound up.
- Responsibility was imposed on each State Government to report on the number of saw mills, actual capacity of mills, proximity to the nearest forest and their sources of timber.
- Complete ban on felling of trees in the forests of Arunachal Pradesh. Felling of forests in other States also suspended except in accordance with working plans.
- Movement of cut trees and timber banned.
- Each State Government to constitute expert committees to identify forest areas and forests covered by plantation trees and to assess the sustainable capacity of the forest in relation to saw mills.
- In State of Jammu & Kashmir, no private agencies should deal in felled trees or in timber.
- In Tamil Nadu the tribals who are residing in the forest area to continue to grow and cut trees according to the Government scheme and in accordance with the law applicable.

The case came back within four months for review of the follow up action as directed by the Court. Interestingly, the Court proceeded to constitute a committee to oversee the implementation of its orders in the north-eastern region of India. Unlicensed saw mills and veneer and plywood industries in the States of Maharashtra and Uttar Pradesh were directed to be closed. All trees felled in the janman areas of Tamil Nadu were ordered to be delivered by the plantations to the State Government.

The orders passed by the Supreme Court clearly demonstrates the failure of executive to ensure compliance with the forest laws of India, so much so that even for the supervision of the implementation of the Court orders, the Court had to constitute a committee, a work which otherwise should have been done by the executive.

Many developing countries look to India as a country where human rights are championed by an independent judiciary and certainly in the area of environmental protection through the means of PIL, the Indian judiciary has led by some landmark examples which aptly shows the commitment of the Courts in India towards this cause.

## INTEXT QUESTION 27.8

1. Name four leading cass relating to protection of Enviornment.

## WHAT HAVE YOU LEARNT

A Tribunal is established for the adjudication of disputes related to some specific areas, whereas courts exist for the adjudication of all kinds of disputes regardless of any specific area. Whenever a Tribunal is created by law the jurisdiction of courts to adjudicate the disputes related to that area for which the Tribunal is created is taken away from it and given to the Tribunals.

The National Green Tribunal was established under the National Green Tribunal Act, 2010 for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.

National Green Tribunal is empowered to provide by an order:

- Relief and compensation to the victims of pollution and other environmental damage arising under the enactments specified in Schedule I (including accident occurring while handling any hazardous substance) of the Act.
- For restitution of property damaged
- For restitution of the environment for such area or areas

A 'hazardous substance' is defined under the Hazardous Wastes (Management and Handling) Rules, 1989, not only as a substance, but also as a preparation, which by reason of its chemical or physico-chemical properties or handling is liable to cause harm to human beings, other living creatures, plants, micro-organisms, property or the environment.

The 'Kyoto Protocol' sets binding obligations on industrialised countries to reduce emission of Greenhouse gases.

International Instruments are like legislations and rules drafted by the different countries coming together at the international level to make laws applicable to them. There are several such International Instruments which collectively constitute what is known as International Environmental Law.

The clean air people in Delhi breath is largely because of the PIL which was heard by the Supreme Court highlighting the dangers of the air pollution caused

by the vehicles causing pollution by emitting dangerous smoke as a result of the use of diesel and petrol. It took several years for the Court to ensure that the public transport vehicles plying on the roads of Delhi must use CNG as fuel and not petrol and diesel. All this could be realised through the means of PIL.

Through the means of PIL, the Supreme Court has also undertaken the task of pollution in the river Ganga. Supreme Court in 'Bichhri village case' applied the 'Polluters Pays Principle' and asked the polluting industries to compensate for the environmental damage caused by it. This case also reached the Supreme Court through the means of PIL.

Supreme Court has also undertaken the task of forest preservation very actively through the means of PIL in *T. N. Godavarman Tirumulkpad* case.

## TERMINAL QUESTIONS

1. What were the reasons for the establishment of National Green Tribunal?
2. What is the composition of National Green Tribunal?
3. Describe the jurisdiction of National Green Tribunal?
4. What can be the impact if the Hazardous Wastes are not properly treated, stored or disposed off?
5. What are the different steps in the handling and management of Hazardous Wastes?
6. What are the Greenhouse Gases?
7. Define the 'International Environmental Law'?
8. Define the 'Judicial Activism' especially as applied in the field of environmental protection?
9. Discuss briefly the role of Public Interest Litigation (PIL).
10. Name the four leading Judgements of the Supreme Court relating to Environment Protection.
11. Under which provisions of the Constitution of India a PIL can be filed in the Supreme Court and the High Courts in India?
12. Define 'PIL'? Explain the basic features of PIL.
13. What do you understand by the Adversarial System of Dispute Resolution by the Courts?
14. Explain briefly the *'Delhi Vehicular Pollution* case'.

15. How and why did the Supreme Court of India apply the 'Polluters Pay Principle' in the *Bichhari Village* case?

## ANSWER TO INTEXT QUESTIONS

### 27.1

1. The main reason behind the establishment of Tribunal is to ensure expeditious adjudication of disputes by including experts from the area concerned as adjudicators along with the judicial members.
2. The National Green Tribunal was established for the effective and expenditions disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcemnet of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matter connected there with or incidental thereto.
3. 'No Fault' principle stipulates that in case of accident the owner or the employer cannot take the defence of him having committed no fault. If accident occurs and as a consequence of it damage is caused to any person or environment, the owner or the employer is liable, only because of the fact that accident occurred in his enterprise.
4. In an appeal the person who has lost the case can again challenge the decision made by the NGT before the Honourable Supreme Court.
5. Minimum number of members who must together hear and decide a case is two, out of which one must be a judicial member and other an expert member.

### 27.2

1. The substance or preparation which by reason of its chemical or physico-chemical properties or handling is liable to cause harm to human beings, other living creatures, plants, micro-organisms, property or the environment is called 'Hazardous Waste'.
2. Hazardous Waste if unattended and simply dumped can give rise to serious health and environmental issues.
3. The objective behind the making of Hazardous Wastes (Management and Handling) Rules, 1989 is the control and management of Hazardous Waste.
4. EIA implies that the impacts from the project of treatment, storage and disposal of hazardous waste should be identified and public acceptance should be obtained for clearing the site for such use. This is the needed EIA in relation to the management and handling of Hazardous Wastes.

## 27.3

1. Carbon Dioxide, Methane, Nitrous Oxide, Sulphur Hexafluoride and two groups of gases hydro fluorocarbons & per fluorocarbons.
2. Greenhouse gases are responsible for the climate change which includes rise in average temperature of the Earth and depletion of the ozone layer.
3. Kyoto Protocol is the example of a measure undertaken at the international level under the aegis of the United Nations aimed at curbing the emission of Greenhouse gases.
4. Because the emission of greenhouse gases is responsible for climate change, hence its reduction will automatically stop the extent of damage caused to the environment.

## 27.4

1. The RIO Delaration on Environment and Devlopment or the Convention on Environment and Development at Rio de Janeiro in the year 1992 & United Nations Framework Convention on Climate Change (UNFCC).
2. UNFCC sets an overall framework for intergovernmental efforts to tackle the challenge posed by climate change.
3. The three main objectives are:
   i. The conservation of biological diversity;
   ii. The sustainable use of its components; and
   iii. The fair and equitable sharing of the benefits from the use of genetic resources.
4. The 'RIO Declaration' on Environment Development, 1992 builds on the principles of sustainable development, inter-generational equity, and sovereign rights in the Stockholm Declaration, expands the concept of sustainable development and reaffirms, amongst others, the importance and centrality of the Precautionary Principle, Polluters Pay Principal and the Environmental Impact Assessment.

## 27.5

1. Yes
2. Yes
3. Absolute Liability
4. No

## 27.6

1. Yes
2. Today a person acting bona-fide and having sufficient interest can move the Courts under PIL for redressing public injury, enforcing public duty or for protecting social and collective rights and interests. . The cause of environment has been taken up before courts through PIL by a wide spectrum of people in society. Lawyers, association of lawyers, environmentalists, groups and centres dedicated to environment protection and forest conservation, welfare forums, consumer research centres have successfully agitated environmental issues before Courts.
3. The range of issues in PILs has been very broad. It extends from compassion to animals and privileges of tribal people and fishermen, to the eco-system of the Himalayas and forests, eco-tourism, land use patterns and problems facing a village due to ecological damage.
4. Adversial System of Justice Delivery means that the two parties to the case fight the case between each other and the judge simply sits as a neutral umpire or referee to decide who has a better case.

## 27.7

1. Environment Pollution (Prevention and Control) Authority
2. Compressed Natural Gas
3. Air Pollution
4. Water Pollution

## 27.8

1. (i) The Delhi Vehicular Pollution Case.
   (ii) M. C. Mehta vs. Union of India, Ganga Pollution Case.
   (iii) Indian Council for Enviro-Legal action vs.Union of India–The Bichhri Village Case.
   (iv) T. N. Godavarman Triumulkpad vs. Union of India (AIR 1997 S.C. 1228).

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# 28

# CONSUMER PROTECTION

Little Alia saved some money to buy a small gift for her brother on his birthday. She went with her mother to a nearby store and bought a very basic phone for him. Her brother was going to the nearby big city for a job, so they wanted to keep in touch with him on the phone. Gopal was very delighted to receive the phone as a birthday present, but this happiness did not last for many days. Just as he reached the city, his phone stopped working, and he had to use another phone to talk to his family. What should Alia and Gopal do? They are consumers and they have "CONSUMER RIGHTS". The following text talks about the right of consumers and consumer law.

So, in this lesson we will study about the evolution of Consumers Law in India, the main provision of Consumer Protection Act, 1986 and the meaning of the terms Consumer; 'Consumer Service', 'Consumers Protection's and 'Consumers's Rights'.

## OBJECTIVES

After reading this lesson you will able to:

- know HISTORY AND EVOLUTION OF CONSUMER LAW;
- understand the meaning of the term 'CONSUMER';
- describe the term CONSUMER PROTECTION;
- discuss the main provisions of THE CONSUMER PROTECTION ACT, 1986; and
- identify RECENT AMENDMENTS in the Consumer Protection Act, 1986.

## 28.1 HISTORY AND EVOLUTION OF CONSUMER LAW

We will try to understand the definition and meaning of a 'Consumer' in the next section of this lesson but before that a brief understanding of how 'Consumer Law' evolved in India.

Earlier the doctrine of "Caveat Captor " punailed that is "Buyer should be aware" before buying a product, and that once goods are sold, the seller is under 'no liability' if the consumer had not checked them before buying. This was prevalent in India.

So the buyer had to be very cautious before buying a product.

Although there were some legislations to protect the consumer's right like those given below, but they were not adequate.

- The Prevention of Food Adulteration Act
- The Essential Commodities Act
- The MRTP Act

The Consumer Protection Act, 1986, was a very unique and highly progressive piece of legislation and is called the 'MAGNA CARTA' of Indian Consumers.

People like you, Alia and Gopal have now become aware of Consumer's Rights and the sellers cannot escape their liability. When the goods are defective or the remices are deficient, the Consumer has rights which help him.

## INTEXT QUESTIONS 28.1

1. Who is Alia ?
2. Alia's mother buys a packet of sweets. What should she be called ?
3. Does Gopal have a right as a Consumer ?

**Do you know**

A person who has used a product, not bought by him/her, is also a Consumer if he/she has the permission to use it from the person who bought it !

## 28.2 WHO IS A CONSUMER ?

To put it simply, a 'Consumer' is a person who

- buys 'goods'; or
- hires 'Services'.

But there is more to the meaning of 'Consumer'. As per the definition of Consumer Protection Act, 1986; A consumer's definition is in two parts. The

* Liability means the responsibility to pay compensation or replace a product in consumer law.

first part says that a 'Consumer' is a person who pays a price for the goods he/she buys. [So, a 'Buyer' is a 'Consumer'] The second part says that a 'Consumer' is a person who pays for the 'Services' he/she hires. [So, a HIRER of 'Services' is a 'Consumer']. However, goods bought for business or commercial purposes are not covered by the Act

(a) BUYER – Eg. a buyer of a TV Set.

HIRER – Eg. a higher of a Taxi Service.

(b) Ramanujan pays a sum of Rs 100/- for a hair cut to a hair dresser. Is he a Consumer?

(c) Karishma goes to a Government Hospital for a check-up. Is she a 'Consumer'*?

(d) Preeti goes to a Mall and buys a beautiful new dress. After wearing it once, she washes it and the dress tears off while doing so. Can she return the dress?

## INTEXT QUESTIONS 28.2

1. Who is a consumer?
2. Is a 'Hirer' of services a consumer?

## 28.3 CONSUMER RIGHTS

We all know and have heard about 'Rights'. But we don't know how to recognise them and enjoy them. You must have heard of Consumer's Rights. Yes, you also see some advertisements on TV about Consumer awareness. Have you seen "Jaago Grahak Jaago" ? Let us see what are Consumer Rights.

Consumer Rights are those rights which a buyer of a product or hirer of a service, has against the seller.

The following are Consumer Rights Listed by the United Nations:

1. Right to safety;
2. Right to be informed;
3. Right to choose;
4. Right to be heard;
5. Right to redress;
6. Right to consumer education;
7. Right to healthy environment; and
8. Right to basic needs.

* Since Government services are free services, they are not coverd under the Consumer Protection Act, in spite of the taxes which we pay.

**Do you know**

A Consumer's biggest and strongest right is to refuse to buy because by that the seller loses his customers and loses business too !

Every year 15th March is observed as the 'Consumer Right Day'.

## INTEXT QUESTIONS 28.3

1. Define Consumer Rights.
2. Name any Two Rights of consumer under the Consumer Protection Act (C.P.A.), 1986.

## 28.4 THE CONSUMER PROTECTION ACT, 1986 (C. P. A.) IN SHORT)

We know about Consumer's Rights. But the Act which identifies and provides protection to the rights of 'Consumer' is the Consumer Protection Act, 1986.

Like every 'Act' this 'Act' also has various Sections, Sub-Sections and Clauses. For example, Section 2, Sub-Section (1) and Clause (d) of the Sub-section (1), will be represented as under S.2 (1) (d).

Now this Section 2 (1) (d) of the Consumer Protection Act, defines a 'Consumer', which we discussed earlier.

The Consumer Protection Act, (CPA), 1986 aims at providing simple, quick and cheaper protection to the Consumer under a 'three-tier' quasi-judicial redressal regime at the District Level, State Level, and National Level,

'Redressal' means a Remedy to a 'Consumers' dispute, under the CPA, 1986.

So, these are the places one goes to when a Consumer's right is violated. The main object of this Act is the protection of the Consumer, which we will discuss in the following part of this lesson.

The following are the main objects of the CPA, 1986.

1. Protection of interests of Consumers.
2. Protection of rights of Consumers.

Which include:

(a) Protection against dangerous goods and services which are hazardous to life and property;.

(b) Right to information about the quality, quantity, potency, purity, standard, and price of goods or services to so as to protect him against unfair trade parities like false discrediting exaggerated claims etc.;

(c) Right to be heard;

(d) Right to access to variety of goods;

(e) Right to seek redressal; and

(f) Right to consumer education

**Do you know**

It is the responsibility of the Central Consumer Protection Council (CCPC) to educate the Customers !

## INTEXT QUESTIONS 28.4

1. Name the 'Act' in India, which protects the Consumers rights and provides redressal to Consumer disputes?
2. Name any two rights of 'Consumer' under the Consumer Protection Act, 1986?
3. Whose responsibility is it to educate the Consumers ?
4. Which day is celebrated as the Consumer Rights Day ?
5. Where do you go to when a Consumer right is violated ?
6. Preeti goes to a Cosmetic shop to buy some nail polish bottles. Does she have a right to choose

## 28.5 THE FORMAL DEFINITIONS OF CONSUMER AND SERVICE

### "Consumer"

Section 2 (i)(d) of the Consumer Protection Act, 1986 defines a Consumer. It says –

'Consumer' means any person who buys any goods for consideration which has been paid or promised, or partly paid and partly promised, or under buy deferred payment and includes any use of such goods other than the person who buys

such goods for consideration, when such goods are is used with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, the includes the beneficiary of such services of her than the person who hires or avails of the services for consideration. When such services are availed of with the approval of the first mentioned person".

You do not have to mug up this definition. It is only for reference. The meaning of 'Consumer' has already been explained in the previous section. [Section 1.2 of the Lesson]

### "Service"

Sectoin – 2 (i) of CPA, 1986 defines 'Service'–

'Service' means service of any description which is made available to potential users and includes the provision of facilities in connection with *banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information.*"

Free services are excluded; so they are not 'Services' within the meaning of Consumer Protection Act, 1986. So, free government services are also excluded.

**Do you know**

So, if a courier reaches after the promised date, there is "deficiency" in service !

## INTEXT QUESTIONS 28.5

Answer the following

1. Define the term 'Service' as defined by CPA, 1986.
2. Which Section of the CPA defines 'Service'?
3. Rupa went to a bank to open an account, and the bank offered an interest of 9% on her savings. But eventually, when she opened the account, it was reduced to 8%, although the prevailing rate was 9%. Is the bank liable under the Consumer Protection Act 1986?

## 28.6 LANDMARK CASES

1. **Lucknow Development Authority v. M. K. Gupta**

   **Ratio :** A person who applies for an allotment of a flat, is a 'Consumer' and is protected under the CPA, 1986.

2. **Indian Medical Assoc. v. V. P. Shanta**

   **Ratio :** 'Services' rendered by medical Practitioners area 'services' under the CPA, 1986. However, hospital giving free senice are excluded.

3. **Transasia Bio Medicals Hd. v. Dr. D. J. Desonga [22nd Jan 2013]**

   A defective second hand auto analyser was returned and money returned to the consumer.

## 28.7 RECENT AMENDMENT BILL

The Forums established under CPA, 1986 have become clogged with pendency of cases, effective compliance is difficult to monitor and very low. The amendment bill seeks to change this and addresses these issues in a variety of ways.

For instance, the Bill allows for–

- Filing of Consumer Complaints on line
- non-compliance of orders of the power are now punishable by a time of five hundred rupees or one half per cant of award amount for each day of non-compliance.
- Award of the Consumer Forum is now like a 'Decree' of the Civil Court of competent jurisdiction
- The definition of the terms "*deficiency*", "*defect*" and "*unfair trade practice*", is being provided for by the Amendment Bill.

**? Do you know**

A 'Forum' under the Consumer Act, consists of judge and two members, and is called quasi-judicial, which means it decides like a Court !

## INTEXT QUESTIONS 28.6

1. What is a Consumer Complaint ?
2. Is the 'Award' of the Consumer Forum like a 'Decree' of a Civil Court?

## WHAT YOU HAVE LEARNT

- The Consumer Protection Act 1986 is the 'Magna Carta' of the Consumer's Rights in India. A 'Consumer' is a person as defined in 5 2(1) (d) of the Consumer Protection Act, 1986. A 'Service' is explained in 5 2(1) (0) of the Consumer Protection Act (CPA), 1986.
- 'Service' includes banking, insurance financing, transport, processing, supply of electrical or other energy, boarding or lodging or both, housing, costruction, entertainment, Government, or the purveying of news or other information. Free services are excluded from the purview of 'Service'.
- Goods/Services taken without 'Consideration' do not make you a consumer. Goods/Services taken for business or commercial purposes, are not covered by the Act, and, therefore, do not make you a 'Consumer'. A 'Consideration' is money paid or a value given for goods or services. See the Section 2(1) (d) is defined in two parts. The first part defines a 'Consumer' as a person who has bought goods, and the second part defines a 'Consumer' as a person who has hired services.
- The Consumers have certain rights. The Consumer Protection Act, 1986 provides forums for redressal, as all Consumer have a right to redressal. These forums are at the District, State and National Level. It is the responsibility of the CONSUMER PROTECTION COUNCIL to educate the Customers. Some landmark Cases are 'Transasies Bio Medicals Ltd. v. D. J. Desouzar', 'Lucknow Development Authority v. M. K. Gupta' and 'Indian Medical Association v. V. P. Shantar'
- Consumer Laws are important for the protection of the rights of Consumers for a healthy environment for both the Consumers and business.

## TERMINAL QUESTIONS

1. List any two rights of a Consumer.
2. Which body is responsible for educating the Consumers in India ?
3. Which day is celebrated as the Consumer Rights Day ?
4. List any two services included in the Section 2 (1) (0) of the CPA, 1986.
5. What Kinds of goods/services are excluded from the CPA, 1986?
6. What is 'Consideration' ?
7. Define a 'Consumer' in your own words.
8. What are the rights of Consumer under the Consumer Protection Act, 1986?

9. Sheela's car's air conditioner stopped working within one month of its purchase. The showroom sales person was approached but he/she refused to repair it free of cost. What can Sheela do ?

**Write True or False**

1. 'Liability' means the responsibility to pay Compensation or replace a product.
   (True/False)
2. The Consumer Protection Act, 1986 is a very unique and highly progressive piece of legislation and is called the "Magna Carta" of Indian Consumers. (True/False)
3. A person who has used a product, not bought by him/her, is also a 'Consumer' is he/she has no permission to use it from the person who bought it. (True/False)
4. A person is not a 'Consumer' if he/she buys the goods for business or commercial purpose. (True/False)
5. Government Services or free services are considered as 'services' under the Consumer Protection Act, 1986. (True/False)
6. Consumer rights are available against the buyer. (True/False)
7. Definition of the word 'Consumer' is provided under Section 2 (1) (d) of the Consumer Protection Act 1986. (True/False)
8. 'Redressal' means a 'remedy' to a consumer under the Consumer Protection Act, 1986. (True/False)
9. It is not the responsibility of the Central Consumer Protection Council to educate the Customers. (True/False)
10. Consumer has no right to access to variety of goods. (True/False)
11. A Forum under the Consumer Act, consists of a judge and is called 'Quasi-judicial', which means it decides like a regular Court. (True/False)
12. Amendment Bill Provides Award of the Consumer Forum is now like a 'Decree' of the Civil Court of competent jurisdiction. (True/False)
13. A 'Service' is explained in see 2 (1) (0) of the C. P. A., 1986. (True/False)
14. Unfair Trade Practices affect the small businessmen who can't sustain by reduction of prices below the manufacturing cost. (True or False)

## ANSWERS TO INTEXT QUESTIONS

### 28.1

1. Alia is a 'Customer'
2. 'Consumer'
3. Yes

### 28.2

1. A 'Consumer' is a person who pays a price for the goods he/she buys. So, a 'Buyer' is a 'Consumer'.
2. Yes

### 28.3

1. Consumer's Rights are those rights which a 'Buyer' of a 'Product' or 'Higher' of a 'Service' has against the seller or service provider.
2. (i) Right to redress

   (ii) Right to be informed.

### 28.4

1. Consumer Protection Act 1986
2. (i) Right to choose

   (ii) Right to be heard
3. Central Consumer Protection Council (CCPC)
4. 15th March is observed as the 'Consumer Right Day'
5. Consumers Dispute Redressal Court
6. Yes

### 28.5

1. 'Service means service of any description which is made available to potential users.
2. Sec - 2(i) of C.P.A defines 'Service'
3. Yes

### 28.6

1. Any complaint against any defective and deficiency in services filed by a consumer is called a consumer's complaint.
2. Yes

Notes

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# UNFAIR TRADE PRACTICES

Akshay was a small businessman manufacturing shampoo by the name of 'Mehak'. The people in the village started liking the shampoo as it was a good product for a *small price.* The big company branded shampoo 'Khushboo' lost its customers to 'Mehak'. The big company started selling their shampoo at a price lesser than 'Mehak'. They did not bother if they suffered temporary losses in profits as long as Mehak' was completely taken over by 'Khushboo'. Akshay, on the other hand could not reduce the price because if he reduced the price any further he would have suffered heavy losses. In sometime 'Khushboo' took over "Mehak' and Akshay had to close down his business. Eventually Khushboo' shampoo rates were increased. The villagers had no choice but to buy the costly shampoo.

Do you think this is FAIR? Of course, not, It is neither fair for Akshay nor the villagers. Unfair Trade Practices affect the small businessmen who can't sustain by reduction of prices below the manufacturing cost.

Competition is good but only as long as it is fair, healthy and within the prescribed standards. There are also laws to protect small businessmen like Akshay. The Competition Act, 2002 is one of them.

Methods employed by the various businessmen to increase profits by cheating customers or employing other means like price reduction and giving free gifts to customers by including the cost of the gift in the goods sold are very commonly seen and an alert consumer will always report such practices to the appropriate Forum, Let's see how any of us can be a victim of Unfair Trade Practices.

## OBJECTIVES

After studying this lesson you will be able to:

- define the term 'Unfair Trade Practice';
- know the meaning of terms 'Monopoly' and 'Competition';
- understand the process of redressal against Unfair Trade Practice; and
- appreciate the role of the Competition Commission of India.

## 29.1 UNFAIR TRADE PRACTICE

UNFAIR TRADE PRACTICE means a trade practice or a business practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice.

**Unfair Trade Practices may be categorized as under:**

**False Representation**

The practice of making any oral or written statement or representation which:

- Falsely suggests that the goods are of a particular **standard quality,** quantity, grade, composition, style or model;
- Falsely suggests that the services are of a particular **standard, quantity or grade;**
- Falsely suggests any re-built, second-hand renovated, reconditioned or **old** goods as new goods;
- Represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which they do not have;
- Represents that the seller or the supplier has a sponsorship or approval or affiliation which it does not have;
- Makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;
- Gives any warranty or **guarantee** of the performance, efficacy or length of life of the goods, that is not **based on an adequate or proper test;**
- Makes to the public a representation in the form that purports to be a warranty or guarantee of the goods or services;

- A promise to replace, maintain or repair the goods until it has achieved a specified result,

  If such promise is **materially misleading** or there is no reasonable prospect that such warranty, guarantee or promise will be fulfilled

- Materially **misleads about the prices** at which such goods or services are available in the market; or
- Gives false or misleading facts disparaging the goods, services or trade of another person.

### False Offer of 'Bargain Price'

Where an advertisement is published in a newspaper or otherwise, whereby goods or services are offered at a bargain price when in fact there is no intention that the same may be offered at that price, for a reasonable period or reasonable quantity, it shall amount to an Unfair Trade Practice. The 'Bargain Price', for this purpose means –

- the price stated in the advertisement in such manner as suggests that it is lesser than the ordinary price, or
- the price which any person coming across the advertisement would believe to be better than the price at which such goods are ordinarily sold.

### Free 'Gift Offer' and 'Prize Scheme'

The unfair trade practices under this category are:

- Offering any gifts, prizes or other items along with the goods when the real intention is different, or
- Creating impression that something is being offered free along with the goods, when in fact the price is wholly or partly covered by the price of the article sold, or
- Offering some prizes to the buyers by the conduct of any contest, lottery or game of chance or skill, with real intention to promote sales or business.

### Non-compliance of Prescribed Standards

Any sale or supply of goods, for use by consumers, knowing or having reason to believe that the goods do not comply with the standards prescribed by some competent authority, in relation to their performance, composition, contents, design, construction, finishing or packing, as are necessary to prevent or reduce the risk of injury to the person using such goods, shall amount to an 'Unfair Trade Practice'.

### Hoarding, Destruction

Any practice that permits the hoarding or destruction of goods, or refusal to sell the goods or provide any services, with an intention to raise the cost of those or other similar goods or services, shall be an 'Unfair Trade Practice'.

## INTEXT QUESTIONS 29.1

**State true or false:**

1. Any practice that permits the hoarding or destruction of goods, or refusal to sell the goods or provide any services, with an intention to raise the cost of those or other similar goods or services, shall be an 'Unfair Trade Practice'.
2. Offering any gifts, prizes or other items along with the goods when the real intention is different and is not an 'Unfair Trade Practice'.
3. The practice of making any oral or written statement or representation which falsely suggests that the goods are of a particular **standard quality,** quantity, grade, composition, style or model is called unfair trade practice.
4. Selling any re-built, second-hand renovated, reconditioned or **old goods as new goods** is acceptable to the consumer and is not an 'Unfair Trade Practice'.

## 29.2 MONOPOLY AND COMPETITION

When a specific person or enterprise is the only supplier of a particular commodity a monopoly exists. 'Monopolies' are thus characterized by a lack of economic competition to produce goods or services and a lack of similar goods. The verb "monopolize" refers to the process by which a company gains the ability to raise prices or exclude competitors. In economics, a monopoly is a single seller. In law, a monopoly is a business entity that has significant market power, that is, the power, to charge high prices. Although 'Monopolies' may be big businesses, size is not a characteristic of a monopoly. A small business may still have the power to raise prices in a small industry.

Holding a dominant position or a monopoly of a market is not illegal in itself. However certain categories of behavior can, when a business is dominant, be considered abusive and therefore incur legal sanctions. A government granted monopoly or *legal monopoly,* by contrast, is sanctioned by the State, often to provide an incentive to invest in a risky venture or enrich a domestic interest group. Patents, copyright and trademarks, are sometimes used as examples of government granted monopolies, but they rarely provide market power. The government may also reserve the venture for itself, thus forming a government monopoly.

**Do you know**

Monopoly in itself is not illegal.

### Do and Learn

Find about from your grandparents which BRAND of biscuit they ate as kids. Do you think they had many choices?

## INTEXT QUESTIONS 29.2

1. What is 'Monopoly'? Give any one example.
2. Sanjana started a business of selling cakes. Varun started the same business and started selling cakes at a much lower price than the total cost of production of cakes. Eventually Sanjana had to close down her business and all her customers went to Varun. Do you call this an 'Unfair Trade Practice' by Varun?
3. Name one Act which checks 'Trade Monopoly'.

## 29.3 REDRESSAL AGAINST UNFAIR TRADE PRACTICES

### 29.3.1 The Consumer Protection Act, 1986

The Consumer Protection Act, 1986 is an Act to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith.

While consumers are protected under this Act the small businessmen are protected under the Competition Act mentioned below.

### 29.3.2 The Competition Act, 2002

The Competition Act 2002 has been enacted to promote competition in India. The ultimate aim of competition law is to protect consumer welfare as competition in a market ensures that market players are looking to find the most efficient means of production (resulting in good quality services and goods at lower prices). However, unlike the previous Indian competition law, the Monopolies and Restrictive Trade Practices Act (commonly called the MRPT Act), the Competition Act 2002 does not apply to all "unfair trade practices". So, while many consumer disputes would have come under the MRTP Act, the new Competition Act will not always apply to such cases.

The Competition Act basically does three things. It prohibits:

1. **Anti Competitive Agreements** - Anti-competitive practices are practices that prevent or reduce competition in the market.

   Agreements in respect of Production, supply, distribution, storage, acquisition or control of goods or provision of services that cause or are likely to cause appreciable adverse effects on competition within India are anti-competitive agreements.

2. **The Abuse of Dominant Position** - Abuse of a dominant position occurs when a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially.

3. **Competition Commission of India** is a body of the Government of India responsible for enforcing The Competition Act, 2002 throughout India and to prevent activities that have an adverse effect on competition in India. It was established on 14 October 2003. It became fully functional in May, 2009.

## INTEXT QUESTIONS 29.3

1. Name any two Acts which provide redressal in Unfair Trade Practices.
2. What are anti-competitive agreements?

## 29.4 COMPETITION COMMISSION OF INDIA

**Competition Commission of India** is a body of the Government of India responsible for enforcing The Competition Act, 2002 throughout India and to prevent activities that have an adverse effect on competition in India. It was established on 14 October 2003. It became fully functional in May, 2009

The Competition Commission of India performs the following functions:

- Make the markets work for the benefit and welfare of consumers.
- Ensure fair and healthy competition in economic activities in the country for faster and inclusive growth and development of economy.
- Implement competition policies with an aim to effectuate the most efficient utilization of economic resources.
- Develop and nurture effective relations and interactions with sectoral regulators to ensure smooth alignment of sectoral regulatory laws in tandem with the competition law.

- Effectively carry out competition advocacy and spread the information on benefits of competition among all stakeholders to establish and nurture competition culture in Indian economy.

## INTEXT QUESTIONS 29.4

1. Who is responsible for enforcing the Competition Act, 2002?
2. Mention any two functions of the Competition Commission of India.

**Do you know**

The Competition Act, 2002 has repealed the MRTP Act!!!

## WHAT YOU HAVE LEARNT

- Unfair practices may be categorized as under:
  - False representation;
  - False offer of bargain price;
  - Non-compliance of prescribed standards;
  - Free gifts offer and prize schemes; and
  - Hoarding, destruction, etc.
- **Anti Competitive Agreements** - Anti-competitive practices are practices that prevent or reduce competition in the market. ***Agreements in respect of Production, supply, distribution, storage, acquisition or control of goods or provision of services that cause or are likely to cause appreciable adverse effects on competition within India are anti-competitive agreements.***
- **The Abuse of Dominant Position** - Abuse of a dominant position occurs when a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially.

## TERMINAL QUESTIONS

1. What is the full form of MRTP Act?
2. Is it true that the Competition Commission of India is a body of the Government?

3. Define Unfair Trade Practice?
4. When did the Competition Act become fully functional?
5. Describe the main functions of the Competition Commission of India.

## ANSWERS TO INTEXT QUESTIONS

### 29.1

1. True
2. False
3. True
4. False

### 29.2

1. When a specific person or enterprise is the only supplier of a particular commodity a 'Monopoly' exists
2. Yes. This is an unfair trade practice.
3. The Competition Act. 2002

### 29.3

1. The Consumer Protection Act, 1986 and the Competition Act, 2002.
2. Agreements in respect of Production, supply, distribution, storage, acquisition or control of goods or provision of services that cause or are likely to cause appreciable adverse effects on competition within India are anti-competitive agreements.

### 29.4

1. The Competition Commission of India (CCI)
2. Two functions of the Competition Commission of India
   a) Make the markets work for the benefit and welfare of consumers, and
   b) Ensure fair and healthy competition in economic activities in the country for faster and inclusive growth and development of economy.

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# CONSUMER DISPUTES REDRESSAL AGENCIES

When we have any complaint regarding the goods or things we buy we approach the Consumer Courts for 'redressal'. These are the Courts for filing complaints against the traders and companies which have supplied either a wrong or faulty product like a mobile phone or air conditioner or have given a bad or deficient service like delaying that important courier which did not reach in time.

The Consumers Protection Act, 1986 enacted by Parliament, protects the interests of consumers in India. It makes provisions for the establishment of Consumer Councils and other authorities for the settlement of consumers' disputes and matters connected therewith.

Consumer Dispute Redressal Agencies have been established at three different levels. At the district level, there is a District Consumer Disputes Redressal Forum (DCDRF), which is also known as 'District Forum'. At the State level there is a State Consumer Disputes Redressal Commission (SCDRC), which is also known as 'State Commission'. At the National level, a 'National Consumer Disputes Redressal Commission (NCDRC) has been established by the Central Government. It is also known as 'National Commission'. It is a National level Court that works for the whole country and entertains complaints where the value of the goods or services and compensation, if any, claimed, exceeds one crore. It also hears and decides appeals against the orders or 'award' of State Commissions.

## OBJECTIVES

After studying this lesson you will be able to:

- understand the meaning of term 'Redressal';
- 'define'Consumer Courts';

- identify the various types of Consumers Disputes Redressal Agencies;
- explain the Jurisdiction of District Forum, State Commission and National Commission; and
- Discuss New Developments in the field of Consumers Dispute Redressal.

## 30.1 WHAT IS CONSUMER REDRESSAL?

'Redressal' means a remedy for the loss suffered by consumers like us.

The word 'REDRESSAL' means a 'REMEDY'. These Forums (Courts) award compensation to the consumer if the manufacturer or the trader or the service giver is at fault. So, anyone who has suffered a loss can claim compensation, i.e., some amount of money based on the loss incurred by the consumer. For example, if the manufacturer does not give a new handset,the manufacturer can be compelled to repay the money and also in some cases special amount of money for the inconvenience caused due to the faulty product.

The Consumer Protection Act, 1986 has provision for establishing these Redressal Agencies/Courts. There can be more than one 'District Forum' in a District if the State Government notifies about it. These Courts are presided over by the judge and there are two other members. The number of members and the appointment of Judge as the President of the Forum is slightly different for District, State and National Forums.

One more interesting thing about these Courts is they can file a complaint as per the value of the product and this is generally ***called pecuniary value in legal language.***

### INTEXT QUESTIONS 30.1

1. Define the term 'Consumer Redressal'.
2. Give one word for 'Redressal'.
3. Which Act provides for Consumer Redressal?
4. Can there be more than one District Forum in a District?
5. Who presides over the District Consumer Forums?

## 30.2 WHAT ARE CONSUMER COURTS?

Do you know what are 'Consumer Courts'? They are Courts for filing complaints against the traders and companies which have given either a wrong or faulty product like a mobile phone, or have given a bad service like delaying that important courier which did not reach in time.

### Three Types/Levels of Consumer Courts

These Courts *(Consumer Disputes Redressal Agencies)* are of three types/ levels:

- ***National Consumer Disputes Redressal Commission* (NCDRC): *A National Level Court***
- ***State Consumer Disputes Redressal Commission* (SCDRC): *A state level court***
- ***District Consumer Disputes Redressal Forum (DCDRF): A district level court***

Let us call these as 'National Commission', 'State Commission' and 'District Forum' respectively, in short.

For a person who is buying a TV right now at some shop or mall, these special type of Courts provide protection in case of any problem in the item or good/ product/service. The process of filing a Complaint in a Consumer Court is very simple and extremely cheap as even common people like us can do it without any need of a lawyer or paying heavy fee.

## INTEXT QUESTIONS 30.2

1. Define a 'Consumer Court'.
2. Name the Consumer Court at District level.
3. Name the Consumer Court at National level.

**Do you know**

These Forums are nothing but Courts and have judges to decide disputes relating to consumers.

## 30.3 CONSUMER DISPUTES REDRESSAL AGENCIES – DISTRICT, STATE AND NATIONAL LEVEL

You know that our country is divided into areas based on the geographical location. There are three types or levels of consumer courts in the country. These are – District Consumer Disputes Redressal Fourm (DCDRF), State Consumer Disputes Redressal Commission (SCDRC) and National Consumer Disputes Rdressal Commission (NCDRC). Every Court can take a complaint only upto

a certain value. For example **the District Forum can take a complaint of upto 20 1akhs.** It means the **pecuniary jurisdiction** of the District Forum is upto 20 lakh rupees. The next level (State Commission) takes a higher value and the next level (National Commission) takes even higher without any limit.

*It is worth mentioning here that 'Forum' and 'Commission' referred to above are nothing but Courts for the purposes of consumer complaints.*

So it flows like this:

**District level (Forum)**
↓
**State level (Commission)**
↓
**National level (Commission)**

So, based on location and the pecuniary value one can file a complaint at the appropriate 'Forum'. Apart from that, the next higher 'Forum'/'Commission' takes appeals from the lower 'Forum'.

### District, State and National Level

**District Consumer Disputes Redressal Forum (DCDRE):** The District Consumer disputes Redressal Forum (DCDRF) which is also known as the 'District Forum', is established by the concerned State Government in each District of the State. The State Government may establish more than one District Forum in a district. It is a district level Court that deals with cases valuing upto twenty lakhs.

**State Consumer disputes Redressal Commission (SCDRC):** The State Consumer Disputes Redressal Commission (SCDRC) which is also known as 'State Commission', is established by the State Government concerned in the State. It is a State level Court for the redressal of consumer's disputes. It decides cases exceeding rupees twenty lakhs but not exceeding rupees one crore.

**National Consumer Disputes Redressal Commission (NCDRC):** The National Consumer Disputes Redressal Commission (NCDRC)) which is also known as 'National Commission' is established by the Central Government. Consumer's disputes exceeding rupees one creore.

## INTEXT QUESTIONS 30.3

1. What is the pecuniary jurisdiction of District Forum?
2. For filing a complaint against the mobile company which of the following will you go to?

1. District Forum
2. State Commission
3. National Commission

3. Mention the three levels at which these Forums/Commissions work.
4. Where does appeal from State Commission go to?
5. Where does appeal from District Forum go to?

## 30.4 NEW DEVELOPMENTS IN THE FIELD

### 'Mercedes' Benz fined

One of the world's oldest and leading luxury car manufacturer, 'Mercedes Benz' has been slapped a fine of Rs 2 lakhs for selling a used demo car as new to a customer in Chennai.

According to the National Consumer Disputes Redressal Commission, "Selling of used demo car without the knowledge of the customer amounts to an unfair trade practice within the Consumer Protection (CP) Act."

Justice R K Batta, NCDRC Bench said,

> "Any false representation of rebuilt, second- hand, renovated, reconditioned or old goods as new goods, for the purposes of promoting sale thereof, amounts to an unfair trade practice and the victim deserves to be compensated."

### 30.4.1 Airtel asked to Pay

Airtel was directed to pay Rs 10,000 as compensation to one of its customers for providing faulty Internet connection. The East District Consumer Disputes Redressal Forum said the telecom company had provided deficient service to its customer, a Delhi-based lawyer.

### 30.4.2 Cadbury ordered to pay Rs 30,000 to man who found a pin in chocolate

A consumer court in Tripura has ordered **Cadbury India Ltd** to pay a compensation of Rs 30,000 to a complainant who found an iron pin inside a chocolate bar made by the company.

"A man purchased a 'Cadbury Chocolate' on Dec 16, 2011, for his three-year-old daughter and found an iron pin inside the bar when the girl tried to eat it. Subsequently, he filed a complaint before a Consumer Forum," a food department official told reporters here.

"After conducting a hearing, the West Tripura District Consumer Disputes Redressal Forum last week ordered Cadbury India Ltd to pay a compensation of Rs 30,000 to the complainant within a month."

The 'Forum', which in its judgment said the chocolate was hazardous, also asked the chocolate company to pay Rs 1,000 to the complainant towards the cost of litigation.

## INTEXT QUESTIONS 30.4

1. Can you think of any one product which you bought in the last few months which was defective? If yes, name it.
2. Give two cases in which the Consumer Courts directed to pay sompensation for supplying faulty goods or articles.

## WHAT HAVE YOU LEARNT

- The word 'Redressal' means a 'Remedy' for the loss suffered by consumer. There are 'Consumer Disputes Redressal Agencies at District, State and National Level. These are called Disrrict Consumer Disputes Redressal Forum (DCDRF), State Consumer disputes Redressal Commission (SCDRC), and the National Consumer Disputes Redressal Commission (NCDRC) respectively.
- The District Consumer Disputes Redressal Forum (DCDRF), which is commonly known as 'District Forum' has the jurisdiction to entertain consumer's complaints where the value of the goods or services and the compensation, if any claimed, does not exceed rupees twenty lakhs.
- The State Consumer Disputes Redressal Commission (SCDRC), which is also known as State Commission, has the jurisdiciton to entertain complaints where the value of the goods or the services and the compensation, if any, claimed does not exceed rupees one crore. The 'State Commission' can hear and decide the appeal against the orders of District Forum within the district.
- The National Consumer Disputes Redressal Commission (NCDRC) which is commonly known as 'National Commission', has the jurisdiction to entertain complaints where the value of the goods or services and compensation, if any exceeds rupees one crore. The 'National Commission' has also the jurisdiction to hear and decide the appeals against the 'award' or orders of the 'State Commission'.

- There have been some new developments in this field. One of the world's oldest leading luxury car manufacturer 'Mercedes Benz' has been slapped a fine of two lakhs for selling a used demo car as new to a customer in Chennai (Tamilnadu). The National Commission' observed this amounts to unfair trade practice and the victim deserves to be compensated.

  Similarly, 'Airtel' was directed to pay Rs 10,000 as compensation to a customer for providing faulty Internet connection.

## TERMINAL QUESTIONS

1. Define the term 'Consumer Redressal'.
2. What is the 'remedy' for a 'faulty product' which is not replaced?
3. Name the three levels of Consumer Redressal Agenciesprovided in Consumer Protection Act, 1986.
4. Discus the main provisions of Consumer Protection Act, 1986.
5. Explain in brief the various redressal agencies provided in the Consumer Protection Act, 1986.
6. Discuss any two cases which have been decided in favour of the consumers.

## ANSWERS TO INTEXT QUESTIONS

### 30.1

1. 'Redressal' means a 'Remedy' for the loss suffered by consumers like us and this is provided by Consumer Forums/Commissions.
2. 'Remedy'
3. Consumer Protection Act, 1986
4. Yes
5. Judge

### 30.2

1. These are the Courts for filing complaints against the traders and companies which have supplied a wrong or faulty product like a mobile phone or have given a bad or deficient service like delaying an important courier which did not reach in time..

2. District Consumer Disputes Redressal Forum (DCDRF)
3. National Consumer Disputes Redressal Commission (NCDRC)

**30.3**

1. 20 lakh rupees (upto)
2. District Forum
3. (i) District Forum (ii) State Commission (iii) National Commission
4. National Consumer Disputes Redressal Commission (NCDRC)
5. State Consumer Disputes Redressal Commission (SCDRC)

**30.4**

1. Air Conditioner (LG) 1.5 Ton capcity
2. (i) One of world's oldest and leading luxury car manufacturer, 'Mercedes Bens' has been slapped a fine of two lakhs for selling a used demo car.

   (ii) 'Airtel' was directed to pay Rs 10,000 as compensation to a customer as compensation for providing faulty intrnet connection.

31

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# CONSUMER ACTIVISM

We have, so far, learnt that there are three different Forums, one each at the National, State and District level and these are classified on the basis of territory and pecuniary value of the complaint.

Alia lives in East Delhi and therefore, she can file a complaint in the Delhi Consumer Court situated in East Delhi. If she is not satisfied with the judgement, she can go to the next higher level i.e., State Commission located in Delhi. The next appeal can go to the National Forum. Most of the small cases are decided at the district level itself and, therefore, preferring an appeal may not be required. All the awareness about consumer goods and services creates a check on the unscrupulous tradesmen and the defective products which we do not want and which we never purchased.

## OBJECTIVES

After studying this lesson, you will be able to:

- understand the meaning of the term 'Consumer Activism';
- appreciate the significance of Consumer Movement in India;
- define the Objectives, Goals and Tactics of Consumer Movement in India;
- learn how to file a Complaint Petition for defective goods; and
- know how to file a Complaint Petition for deficient services;

## 31.1 WHAT IS CONSUMER ACTIVISM?

The 'Consumer Movement' in India as a social force originated with the necessity of protecting and promoting the interests of consumers against unethical and 'unfair trade practices'. Rampant food shortages, hoarding and the like gave birth to the 'Consumer Movement' in an organised form in the year 1960.

The movement succeeded in bringing pressure on the Government. A major step in this direction was taken in 1986 with the enactment of the 'Consumer Protection Act, 1986'.

**Consumer Activism is activism undertaken on behalf of consumers, to assert consumer rights.**

## INTEXT QUESTION 31.1

1. Define 'Consumer Activism'.
2. In which year the Consumer Protection Act was enacted?
3. Whom does the CPA, 1986 protect?

## 31.2 CONSUMER MOVEMENT IN INDIA

Three elements are necessary for the ideology of a Consumer Movement. These are: identity, opposition and totality. Identify is the self and collective identity of the members of the Consumer Movement. Opposition is the identification and description of the adversary. Totality is the indication that the objectives will be achieved through struggle.

Consumer activists are those leading the consumers in the conflicts with producers, selling agencies etc. Consumers Activists do not only target producers and selling agencies, but also seek to elevate the awareness of consumers collectively with the purpose of altering consumer culture.

The 'Consumer Movement', as a social force, originated in India with the necessity of protecting and promoting the interests of consumers against unethical and unfair trade practices. Rampant food shortages, hoarding and the like gave birth to the Consumer Movement in an organised form in the year, 1960. The movement succeed in bringing pressure on the Government. A major step was taken in 1986.

The Parliament of India passed the Consumer Protection Act (CPA) 1986 with the aim to protect the interest of consumers in India. This Act makes provisiions for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for such other matters connected therewith.

Under the Consumer Protection Act, 1986, consumer protection councils have been established at National State and District level with the object to increase consumer awareness.

Consumer Disputes Redressal Agencies i.e. District Consumer Disputes Redressal Forum (DCDRF), State Consumer Disputes Redressal Commission (SCDRC), also known as 'State Commission' and the National Consumer Disputes Redressal Commission (NCDRC) have been established under the provisions of the Consumer Protection Act, (CPA) 1986 for the redressal of consumers' disputes and for matters connected therewith.

## INTEXT QUESTION 31.2

1. List the main reasons for the origin of Consumer Movement in India.

## 31.3 CONSUMER ACTIVISM – OBJECTIVES, GOALS AND TACTICS

The main aim of 'Consumer Activism' is that the State should protect the interests of consumers against unethical and unfair trade practices.

Goals include making quality goods and better services available to consumers. The ideal goal is to protect consumer's right to question the quality and standards of purchased goods.

Consumer activists tactics may include boycotts, petitioining the producer and seller of goods, goverment, media activism and organishing 'interest groups'.

## INTEXT QUESTION 31.3

1. Explain the goals, objectives and tactics of Consumer Movement in India.

## 31.4 COMPLAINT PETITIONS

In Consumer Courts (quasi judicial consumer disputes redressal bodies), formed under the Consumer Protection Act, 1986 a consumer can seek redress for his/her grievance, relating to defective goods or deficient services. Sample complaint petitions for both the cases are given here. These are just for illustration only. The exact contents of the petition will depend on the facts of the case. Assuming that the pecuniary loss suffered is less than Rs. 20 lakhs, these petitions have been made as applicable to a District Forum. In case the value of loss is more, the petition has to be changed accordingly, as applicable to a State Consumer Disputes Redressal Commission or the National Consumer Disputes Redressal Commission.

### 31.4.1 Sample Complaint Petition for 'Defective Goods'

Case Example:Mr. 'X' purchases a mixer grinder from 'M/s Y & Co.' operating in the same town, in December 2012. Even within the warranty period of 1 year the grinder fails. 'M/s Y & Co.' fails to rectify the defect. The manufacturer 'M/s Z Ltd.,' was also unable to rectify the mixer grinder. Frustrated, Mr. 'X' finally approaches the District Forum.

### 31.4.2 Sample Complaint Petition for Defective Goods

BEFORE THE DISTRICT CONSUMER DISPUTES REDRESSAL FORUM, <NAME OF THE DISTRICT>

Consumer Dispute Case No ...../20 <Year of filing>

A Petition under Section-11 of Consumer Protection Act

and

In the matter of .....

Mr. 'X'

<Address of Mr. 'X'> ..... Complainant

vs.

1. Proprietor,
   M/s 'Y & Co.'
   <Address of Y & Co.>
2. Managing Director,
   M/s 'Z' Ltd.,
   <Address of Z> .....Opposite Parties(O.P.)

To

Hon'ble President and

Members of District Forum

<Name of District>

**May it please your honours**

This complaint petition is being filed on behalf of Mr. 'X',<Address of 'X'>, referred hereafter as Complainant, and is as follows

1.0 That this Complaint Petition is being filed under Sec. 2(1)(b)(i) of the Consumer Protection Act, 1986.

2.1 That the opposite party No. 1 is engaged in the business of selling Consumer **durables** like refrigerator, TV, Mixer Grinder, etc. **to the public for a consideration**, apart from other activities. (Description about the O.P.)

2.2 That the Opposite Party No. 2 is the manufacturer of 'A' brand mixer grinders and other electrical household gadgets and that the mixer grinders of O.P. No. 2 are sold in retail by O.P. No. 1. (Description about the O.P)

**(Narration of the incident)**

3.1 That on 26th December 2012 (date of purchase), the complainant purchased one' A' brand Mixer Grinder, SI. No.....(Details about the equipment purchased) manufactured by O.P. No. 2 from the show room of O.P. No. 1, vide Cash memo No...(Cash memo /Cash receipt No.), a photocopy of the said document is furnished at Arenexure - I.

**Annexure**

3.2 That the mixer grinder abruptly stopped functioning (Nature of problem encountered) on 8th January 2013 (when)

and the matter was immediately reported to O,P. No. 1. As per his advice the defective mixer grinder was handed over in their Service Centre, on 9th January 2013. A photocopy of the Service Centre receipt is furnished at Annexure - II.

3.3 That the mixer grinder was returned back after rectification on 24th January 2013.

3.4 That the mixer grinder was put to use on 25th January 2013. After running hardly for 5 minutes, the mixer grinder once again totally failed.

3.5 That the Complainant immediately reported the matter to O.P. No. 1 and also complained to O.P. No. 2. Copy of the letter is furnished at Annexure - 111, (Furnish important relevant documents.)

3.6 That as per the advice of O.P. No. 1 the defective Mixer Grinder was once again handed over to their Service Centre on 30th January 2013. There was inordinate delay in rectifying the defect by O.P. No. 1. In April 2013 O.P. No. 2 advised O.P. No. 1 to replace the Mixer Grinder, Copy of the said letter is furnished at Annexure - IV.

3.7 That the O.P. No. 1 did not bother to honour the directive of O.P. No. 2 and till date the Complainant is suffering due to non-availability of the Mixer Grinder.

4.0 That the O.Ps had supplied defective good and they have to make good the losses suffered by the complainant.

**PRAYER**

In view of the submissions contained in the preceding paragraphs, the complainant most respectfully prays to the Hon'ble Forum to direct the Opposite Parties to

(a) refund the cost of the Mixer Grinder, Rs. <Cost> along with 18% interest;

(b) pay a sum of Rs. 10,000/- towards the physical strain and mental agony suffered by the complainant and his family members (compensation); and

(c) pay a sum of Rs. 1,000/- towards cost of this petition (Cost);

for which act of kindness, the complainant shall, as is duly bound, ever pray.

Signature

(X) (Name)

Complainant

## INTEXT QUESTIONS 31.4

1. Draft a compalint petition against the supply of defective goods.

## 31.5 SAMPLE COMPLAINT PETITION AGAINST REDERING DEFICIENT SERVICES

### 31.5.1

CASE Example : Mr. 'X' invests a sum of money with 'M/s Y & Co.', a NBFC (Non Banking Finance Company), operating in the same town, in December 2011. The deposit matures in December 2012, but the Company fails to honour its commitment. It does not pay the dues. Frustrated, Mr. 'X' finally approaches the District Forum.

### 31.5.2 Sample Complaint Petition against Rendering 'Deficient Services'

BEFORE THE DISTRICT CONSUMER DISPUTES REDRESSAL FORUM, <NAME OF THE DISTRICT>

Consumer Dispute Case No...../20 <Year of filing>

A petition under Section-11 of Consumer Protection Act, 1986

and

In the matter of

Mr. 'X'

<Address of Mr. 'X'> .....Complainant

Vs.

Chairman & Managing Director

'M/s Y & Co.'

<Address of 'Y & Co.'> ..... Opposite Party

To

Hon'ble President and

Members of District Forum

<Name of District>

**May it please your honour**

This complaint petition is being filed on behalf of Mr. X,<Address of X>, referred hereafter as Complainant, and is as follows

1.0 That this Complaint Petition is being filed under Sec. 2 (1)(b)(i) of the Consumer Protection Act, 1986

2.0 That the opposite **party** is a NBFC, engaged in the business of accepting deposits from the public, apart from other activities. (Description about the O.P.)

**(Narration of the incident)**

3.1 That on 26th December 2011 (date of deposit), the complainant deposited a sum of Rs (amount deposited with the O.P.,) for a period of 1 year, vide Fixed Deposit receipt No...., a photocopy of the said document is furnished at Annexure - I.

3.2 That the F.D. matured on 25th December 2012 and the Complainant approached the office of the O.P., on 26th December 2012, for encashing the FD. But the staff of the Company, on some some pretext or the other delayed making the payment (Nature of problem encountered). Hence the Complainant wrote to the O.P., requesting his immediate intervention. A photocopy of the said letter is furnished at Annexure - II. But the Complainant has not been paid his dues till date.

3.3 That the non-payment of the maturity value of FD, by the O.P., on the scheduled date, amounts to deficiency in service as defined under sec. 2(1)(g) of the Consumer Protection Act.

4.0 That the O.P. has inflicted enormous amount of mental agony and financial loss on the Complainant and his family.

**PRAYER**

In view of the submissions contained in the preceding paragraphs, the complainant most respectfully prays to the Hon'ble Forum to direct the Opposite **Party** to

(a) pay the maturity value of the fixed deposit, Rs ..... along with 18 % interest;

(b) pay a sum of Rs. 10,000/- towards the physical strain and mental agony suffered by the complainant and his family members (compensation); and

(c) pay a sum of Rs. 1,000/- towards cost of this petition (Cost);

for which act of kindness, the complainant shall, as is duty bound, ever pray.

Signature

(X) (Name)

Complainant

**AFFIDAVIT**

I,..... Son of, .....

and residing at .....

do hereby solemnly affirm and declare as under

1. That the facts stated in the complaint petition paras ..... to ..... in ..... Vs. ..... being filed before the Hon'ble (District Consumer Disputes Redressal Forum (, Place) /State Consumer Disputes Redressal Commission(, State)/ National Consumer Disputes Redressal Commission, New Delhi are true to the best of my knowledge and based on the records maintained by me, which I believe to be true.

**Deponent .....**

### Verification

Verified at <Place>, on this ..... day of <Month> <Year> that the contents of the above affidavit are true and correct to the best of my knowledge and belief.

### Deponent

### Note:

1. The Affidavit has to be sworn before the Notary, on a Rs. 10/- non-judicial stamp paper.
2. The details of Place, State, Month, Year are to be filled as per actual.
3. Complainant or Appellant is the Deponent.

## INTEXT QUESTIONS 31.5

1. Draft a sample complaint petition for rendering 'deficient services'.

## WHAT YOU HAVE LEANT

- 'Consumer Activism' is activism undertaken on behalf of consumers, to assert consumer rights. The Consumer Protection Act (CPA) was enacted in the year. 1986 to protect the interests of consumers against unethical and unfair trade practices.
- The main reasons for the origin of Consumer Movement in India were rampant food shortages, hoarding and the like. The necessity of protecting and promoting the interests of consumers against unethical and unfair Trade practices were other important reasons for the origin of Consumer Movement in India.
- The Consumer Courts (Quasi-judicial consumer disputes redressal bodies), formed under the Consumer Protection Act, (CPA) 1986. A consumer can seek redress for his/her grievance, relating to 'defective goods' or 'deficient services'.
- The Consumer Protection Act, 1986 is an Act passed by the parliament in 1986 with the aim to protect the interest of consumers in India. It makes provisions for the establishment of Consumer Councils and other authorities for the settlement of consumers disputes and for matters connected

therewith. Under this Act, Consumer Protection Councils have been established at National, State and District level with the object to increase consumer awareness.

- Consumer Disputes Redressal Agencies i.e. District Consumer Dispute Redressal Forum (DCDRF), State Consumer Disputes Redressal Commission (SCDRC) also known as State Commission and National Consumer Disputes Redressal Commission (NCDRC) have been established under the provisions of this Act for the redressal of consumers' disputes and for matters connected therewith.
- Sample Complaint Petitions for the redressal of disputes relating to (i) supply of 'defective goods' and (ii) for rendering 'deficient services' to the consumer have been drafted in this lesson for the benefit of learners.

## TERMINAL QUESTIONS

1. Define 'Consumer Activism'.
2. Discuss briefly the Objectives, Goals and Tactics of Consumers' Movement in India.
3. Explain the significance of Consumers' Movement in India.
4. Draft a sample Complaint Petition for the supply of 'Defective Goods'.
5. Draft a sample Complaint Petition for 'Deficient Services'.

## ANSWERS TO INTEXT QUESTIONS

### 31.1

1. 'Consumer Activism' is activism undertaken on behalf of consumers to assert consumers rights.
2. The Consumer Protection Act was enacted in the year 1986.
3. The Consumer Protection Act (CPA), 1986 protects the interests of consumers against unethical and unfair trade practices.

### 31.2

1. The main reasons for the origin of consumer movement in India were rampant food shortages, hoarding and the like. The neccessity of protecting

and promoting the interests of consumers against unethical and unfair trade practices were the other reasons for the origin of 'Consumer Movement' as a social force.

## 31.3

1. The goals of consumer movement in India are as follows:

   (i) providing better goods

   (ii) providing better services

   The main objective is that the state should protect the interests of consumers against the unethical and unfair trade practices.

   Consumer activist tactics may include boycotts, petitioning the producers of products government media activism and organising interest groups.

## 31.4

1. Refer to 'Sample Petition' at 31.4.2

## 31.5

1. Refer to 'Sample Petition' at 31.5.2